(18,578.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 350.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, AND WILLIAM A. JAMISON, APPELLANTS,

vs.

JOSEPH E. BLACKBURN, DAIRY AND FOOD COMMISSIONER OF THE STATE OF OHIO.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the circuit court of the United States for the southern district of Ohio	1	1
Caption	1	1
Bill of complaint	2	2
Subpœna	16	13
Notice of application for injunction	17	14
Return of service	18	14
Amended bill of complaint	19	15
Affidavit of Joseph E. Blackburn	20	17
Wm. A. Jamison	24	20
John De Witt Warner	28	23
H. W. Wiley	30	25
Clarence Brown	36	30
Exhibit A—Letter of Dayton Spice Mills Company, February 12, 1901	37	30
B—Test blank sent out by Dayton Spice Mills Co.	38	31
C—Order blank of Dayton Spice Mills Co.	39	32
D—Circular of Dayton Spice Mills Co	40	33

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 9, 1902.

	Original.	Print
Affidavit of Henry A. Weber	42	34
Exhibit A—Wrapper of package of "Ariosa" coffee	45	37
Affidavit of John Kinsella	46	38
Affidavit of James Turner	48	39
Exhibit—Advertisement of "Lion" Coffee	51	41
Exhibit—Advertisement of "Berdan's package coffee"	51	42
Affidavit of George Davis	52	42
John Donovon	53	43
James Turner	55	45
Exhibit A—Copy of circular letter issued by the Ohio Dairy and Food Commissioner, Jan. 1, 1901	59	48
B—Letter of Commissioner Blackburn, February 5, 1901	60	49
C—Circular letter of Woolson Spice Co., February 1, 1901	60	50
Affidavit of Annie Plunket	61	50
Edward Long	63	51
Patrick Clancy	64	53
Philip Schrantz	66	54
Alice Buckon	67	55
Maggie Butler	69	56
Addie Ehlers	70	57
Edward F. Schnuck	71	58
Letters patent No. 73486, granted John Arbuckle, Jr., January 21, 1868	75	61
Affidavit of John H. Culbertson	78	63
Affidavit of Alvin E. Zollinger	79	64
Opinion of Thompson, J.	80	65
Decree	84	68
Allowance of appeal to United States circuit court of appeals	84	68
Petition on appeal	85	69
Assignment of errors	86	70
Bond on appeal	87	71
Order allowing appeal, &c.	90	73
Stipulation for reduction of record on appeal	91	74
Clerk's certificate	91	74
Citation and proof of service	92	75
Minute entry of argument and submission	94	76
Decree	95	76
Opinion	97	77
Petition for allowance of appeal	112	89
Order allowing appeal	113	90
Assignment of errors	115	91
Order granting leave to amend assignment of errors	117	92
Amendment to assignment of errors	118	92
Bond on appeal	121	93
Clerk's certificate	122	94

a United States Circuit Court of Appeals, Sixth Circuit.

JOHN ARBUCKLE ET AL., Appellants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Appellee. } No. 973.

Appeal from the circuit court of the United States for the southern district of Ohio.

Record.

Original transcript filed April 25, 1901.
Filed May 6, 1901.

FRANK O. LOVELAND, *Clerk.*

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA, } *ss:*
Southern District of Ohio, Eastern Division, }

At a stated term of the circuit court of the United States of America, within and for the eastern division of the southern district of Ohio, in the sixth judicial circuit, of the United States of America, begun and had in the court-rooms at the city of Columbus, Ohio, in said district, on the first Tuesday of December, being also the fourth day of that month, in the year of our Lord, one thousand nine hundred, and of the American Independence the one hundred and twenty-fifth.

Present: The Honorable Albert C. Thompson, district judge, sitting and holding circuit court.

Among the proceedings had were the following, to wit:

JOHN ARBUCKLE, WILLIAM V. R. SMITH, James N. Jarvie, and William A. Jamison, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent. } No. 985. In Equity.

Be it remembered that heretofore, to wit, on the 20th day of February, A. D. 1901. came the complainants by their solicitors, and filed in the clerk's office of said court, their certain bill of complaint, against the defendants herein, said bill of complaint is clothed in the words and figures following, to wit:

2 *Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, James N. Jarvie, and William A. Jamison, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

No. 985. In Equity. Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

John Arbuckle, William V. R. Smith, James N. Jarvie and William A. Jamison, each and all of whom are citizens and residents of the State of New York, bring this their bill against Joseph E. Blackburn, dairy and food commissioner of the State of Ohio, and a citizen and resident of said State, and of the eastern division of the southern district thereof.

And thereupon your orators complain and say*s*:

I. Complainants are partners under the firm name of Arbuckle Brothers, and manufacturers of, dealers in and vendors of roasted coffee and other food products, having manufactories and places of business in the States of New York and Pennsylvania. The respondent, Joseph E. Blackburn, is the dairy and food commissioner of the State of Ohio, duly elected, qualified and acting.

II. By an act of the General Assembly of the State of Ohio, passed in the year 1884, entitled, "An act to provide against the adulteration of food and drugs," as amended by an act passed in the year 1890, entitled, "An act to amend section 3 of an act entitled 'An act to provide against the adulteration of food and drugs,' passed March 20, 1884," which said act is still in full force and virtue, it is provided that no person shall, within said State of Ohio, manufacture for sale, offer for sale, or sell any article of food which is adulterated within the meaning of the said act, and that the term "food" used therein shall include all articles used for food or drink by man, whether simple, mixed or compound. It is further provided by said act that food shall be deemed adulterated.

(1.) If any substance, or substances, have been mixed with
3 it so as to lower, or depreciate, or injuriously affect its quality, strength or purity;

(2.) If any inferior, or cheaper substance, or substances have been substituted, wholly or in part, for it;

(3.) If any valuable or necessary constituent, or ingredient, has been, wholly or in part, abstracted from it;

(4.) If it is in imitation of, or is sold under the name of another article;

(5.) If it consists, wholly or in part, of a diseased, decomposed, putrid, infected, tainted, or rotten animal, or vegetable substance, or

article, whether manufactured or not—or in the case of milk, if it is the produce of a diseased animal;

(6.) If it is colored, coated, polished, or powdered, whereby damage, or inferiority is concealed, or if, by any means, it is made to appear better, or of greater value than it really is;

(7.) If it contains any added substance, or ingredient, which is poisonous or injuri-us to health.

It is further provided by said act that:

"The provisions of this act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, if each and every package sold or offered for sale be distinctly labeled as mixtures or compounds, with the name and per cent. of each ingredient therein, and are not injurious to health."

Certain penalties, to wit, a fine or imprisonment, are imposed by said act for the violation thereof.

III. For more than thirty years last past, complainant, John Arbuckle, and his successive copartners, and for many years last past, these complainants have been and still are, engaged in the manufacture and sale throughout the United States, including the State of Ohio, of a certain compound or mixture known as "Ariosa" composed of roasted coffee compounded and mixed with eggs and sugar, originated, invented, patented, manufactured and sold solely by said complainants and their predecessors and by them denominated "Ariosa." Ariosa consists of roasted coffee compounded and mixed with eggs and sugar, packed in sealed packages, ready for use by the consumer. In order to preserve said product from deterioration through the period intervening between its manufacture, sale and actual use by the consumer thereof, and to retain in said coffee its original strength and aroma, the said complainant, John Arbuckle, more than thirty years ago, invented and thereafter he and his associates duly patented, adopted and used, and complainants still use, a certain process, whereby the coffee, there-
4 after to be sold as the compound or mixture known as Ariosa was, and still is, mixed, compounded and the separate beans thereof coated, and, to a large extent hermetically sealed after roasting, with a compound of certain other wholesome articles and ingredients of food, to wit, sugar and eggs; at first in composition with small amounts of Irish moss, also a wholesome ingredient of food, and for 20 years last past without such Irish moss. In the year 1868, letters patent of the United States of America were duly granted to complainant, John Arbuckle, for the said process of glazing and coating which said letters patent *contained* in force of seventeen years. By reason thereof, and during the said period, complainants' predecessors acquired valuable and lasting property rights in said compound or mixture known as "Ariosa," which said rights continued after the expiration of said patent and still do continue in the said complainants, the value of which said property rights has since largely increased and still continues to increase by reason of the increase in repute and sale of the said Ariosa and the good will of said business of manufacturing and vending said

Ariosa, and has become, and now is, wholly dependent upon the repute and sale of the said Ariosa, and the good will aforesaid.

IV. Complainants, furthermore, have, for many years, at large expense, widely advertised the fact of the use of the aforesaid process and of the compounding, mixing and coating of coffee with the aforesaid ingredients, in order that the purchasers and users thereof might be advised thereof, and might by use become informed of the good qualities of such coffee, so mixed, compounded and coated, and of the benefit to the consumer accruing from the use of complainants' aforesaid process.

V. To that end, for many years prior to 1894, complainants' predecessors caused to be printed upon each package of Ariosa, in conspicuous type, a certain label, statement and affidavit setting forth the use of said process and the purpose and effect thereof. And in or about 1894, complainants caused, ever since have caused, and still cause, to be printed in conspicuous type upon every package of Ariosa, a certain label, statement and formula giving a true statement of the process and formula by and according to which said compound is manufactured and the purpose and effect thereof, in the words and figures following, to wit:

"*Ariosa*

"Is a compound made from coffee, sugar and eggs. The coffees "are selected especially for their strength, flavor and superior "drinking qualities, are pure, sound coffees and absolutely "free from all the poisonous coloring substances which are "now so largely used to improve the appearance of coffee. Coffee, "when roasted, is porous, and unless prevented, loses 'its best quali- "ties, and absorbs others which are inferior to it. By our process of "hermetically sealing the pores of roasted coffee, we secure a three- "fold object.'

"1st. The retention of the full strength and aroma for any length "of time.

"2nd. The prevention, through absorption, of any injurious "flavors.

"3rd. The saving to the consumer of the additional expense of "eggs incurred when any other coffee is used.

"Ariosa is self-settling.

"Choice eggs and pure granulated sugar are the only articles "used in hermetically sealing Arbuckle's Ariosa coffee.

"*Formula.*

"Coffee	99278
"Eggs	00361
"Sugar	00361

"Four pounds roasted coffee go as far as five pounds green, as "coffee loses 20 per cent. in roasting."

VI. Being thus fully advised of the composition and preparation of the said compound or mixture known as Ariosa, and as a result of favorable experience in the use thereof, great numbers of people

throughout the United States, and especially in Ohio, have preferred, and do prefer Ariosa to other brands, mixtures or compounds of coffee so treated, and have purchased, and do purchase, the same for the qualities imparted to it by the use of the above-described process; so that, for more than thirty years last past, said compound or mixture has been generally used in Ohio, and throughout the United States. By reason of the qualities imparted to it, by the above-described process, said compound has gained a great repute and sale amongst the people of the United States, and particularly in Ohio, as a healthful, palatable, wholesome and agreeable food product, to wit, a compound or mixture of roasted coffee, eggs and sugar, prepared for most convenient and economical use. The extent and profit of the complainants' business of manufacturing and vending said Ariosa has become, and is now, wholly dependent upon the good will thereof, to wit, the confidence of the pur-
6 chasers and consumers of Ariosa, that, so long as same shall be manufactured and sold by complainants, it shall be identical in quality and composition with that which, under the same brand and appearance they have been, heretofore, wont to purchase and use.

VII. Throughout the United States, and particularly in Ohio, there are commonly exposed for sale, in competition with the compound or mixture known as Ariosa, large quantities of roasted coffee, of various brands, grades and qualities, respectively treated and prepared for sale as follows, to wit:

(*a.*) Mixed, compounded, or coated, with some substance not transparent, and such as either to conceal, or to misrepresent the real condition thereof, or falsely to simulate other grades, or classes of coffee;

(*b.*) So treated as to retain in, or return to, the coffee after roasting, the whole, or some portion, of the water, which naturally would be eliminatad therefrom in the process of roasting, to the material increase in weight of said coffee, while decreasing its worth in proportion thereto;

(*c.*) So treated, mixed, compounded, or coated, with substances of less value, in proportion to the weight of roasted coffee, as to materially increase the weight of said coffee, while decreasing its worth in proportion thereto;

(*d.*) Mixed, compounded, or coated, with ingredients, the presence of which in roasted coffee, or their use in its preparation, is unhealthful and constitutes a dangerous adulteration thereof.

VIII. Complainants' process does not include any of the foregoing processes or methods of treatment. It differs from the practices above set forth, in that it was adopted and is used solely for the purpose, and with the effect of (1) retaining in the coffee the full strength and aroma thereof, for the period during which the same may remain unused after roasting; (2) preventing the absorption by the coffee of any injurious or noxious gases or flavors; (3) settling in the same when prepared for consumption. Said process was not adopted and is not used for the purpose, nor with the effect, of lowering or depreciating or injuriously affecting the quality,

strength, or purity of the coffee; nor of substituting any inferior or cheaper substance or substances, wholly or in part, for it; nor of abstracting from it in any valuable or necessary constituent or ingredient, either wholly or in part; nor of concealing damages or inferiority in the coffee, or making it appear better or of greater value than it really is; nor in any way whatsoever violating the provisions of the said statute of Ohio above set forth. On the contrary,
7 the coffee used in said compound or mixture is of good quality and undamaged; said articles of food used in the process above described for coating said coffee are, in themselves, pure, wholesome, healthful and innocuous; said preparation of egg and sugar, used in the said process for coating said coffee is colorless and transparent, and does not in any way conceal the true nature, grade, or original appearance of said coffee; and said process was adopted and used, and still is used, at great expense, for the benefit of the consumer only, the cost and value of the said ingredients used therein greatly exceeding in proportion to weight and bulk, the worth and value of roasted coffee.

IX. Ariosa is exclusively exposed for sale in sealed paper packages and the purchaser thereof is advised of its quality and composition; (1) by the general repute of the said compound; (2) by his former personal experiences in the use of the same, and (3), by the statement or affidavit setting forth its quality and composition printed on said packages as aforesaid; and is not and cannot be misled by the appearance of the coffee, at the time of the sale, which appearance is not disclosed until after purchase.

X. Complainants now and at all times have on hand at various points throughout the United States large stocks of the compound or mixture known as Ariosa. Said stocks now in Ohio amount to one million pounds, more or less, of the value of one hundred thousand dollars, and in the United States to ten million pounds, more or less, of the value of one million dollars. Complainants have a large number of agents in Ohio and elsewhere, engaged in the sale of said Ariosa, and in addition thereto, as complainants are informed and believe, a great number of dealers, to wit, more than ten thousand in Ohio, have in their possession large quantities of Ariosa for sale, have heretofore sold and still are, and will continue, selling the same to consumers, in preference to other brands of coffee, not similarly prepared, to the profit of complainants, and the increase of their aforesaid business and of the good will thereof.

XI. The respondent herein, Joseph E. Blackburn, dairy and food commissioner as aforesaid, without authority of law, and falsely and erroneously construing the provisions of said statutes above set forth, notwithstanding the fact that the process used in the manufacture of the said compound or mixture known as Ariosa is not in violation of the said statute and that the said statute is not appli-
8 cable to the premises, and that there is no law of the State of Ohio, warranting his acts hereinafter set forth, and further notwithstanding the healthful character of said Ariosa, the benefits accruing to the consumers thereof by reason of the aforesaid process used in its manufacture, and the fact that the use of said process, its

objects and effect, and the ingredients and formula thereof are plainly and expressly stated, printed and advertised upon each package thereof, both personally and through his agents has heretofore, does now and will unless restrained by the order of this honorable court, continue to widely advertise, give out and state that said process used in the manufacture of said Ariosa, is within the prohibition of, and in violation of, the aforesaid statute. Respondent falsely claims and pretends that said sixth clause of the aforesaid statute wholly forbids the glazing of the coffee used in the manufacture of Ariosa. Yet, in fact, said process does not conceal, damage or inferiority, nor make said coffee appear to be better or of greater value than it really is; but, on the contrary, is essential and exclusively used for the purposes and with the effect hereinbefore set forth and particularly described in the statement printed on each package of Ariosa. Said process is not used to affect or change the appearance of said coffee; any change in the appearance thereof due to said glazing being a- incidental and immaterial consequence of the use thereof, not such as to assimilate said coffee in appearance to other or better grades but such as to accentuate and render more clearly distinguishable any defects or imperfections which may exist in the same.

XII. Respondent has menaced and threatened with prosecution, and still menaces and threatens to prosecute dealers in, and vendors of, said Ariosa within *in* Ohio, for a violation of the aforesaid statute, and as complainants verily believe, will, unles- restrained therefrom by the order of this honorable court, institute a large number of prosecutions against such dealers in and vendors of said Ariosa, upon the wrongful and erroneous charge that the treatment of said Ariosa by the process above described is a violation of the statute aforesaid, and that said Ariosa is an adulterated food product within the said statute and the prohibition thereof. By reason of the aforesaid official capacity of the said respondent and the fact that he claims to act under the said statute intended to prevent the adulteration of food products, said respondent's statements and threats of prosecution have led, do lead, and will hereafter continue to lead, the dealers in, and consumers of, said Ariosa throughout the United States and more particularly in Ohio, to doubt the healthful
9 character and proper preparation of the said food product and the integrity of the complainants, as manufacturers thereof, and have deterred, do deter and will hereafter deter, both wholesale and retail dealers and consumers in Ohio and elsewhere from purchasing, vending or using Ariosa, thereby greatly decreasing the repute and sale thereof, to the great and irremediable damage of complainants, the decrease in market value of the stocks of Ariosa, already manufactured and in the possession of the complainants, and of the aforesaid dealers and vendors thereof, and the great impairment of the good will of the aforesaid business of complainants.

XIII. On or about the fifth day of February, 1901, said respondent, in pursuance of his wrongful, erroneous and unlawful construction of the statute aforesaid, and without any authority of law therefor, and as complainants are informed and believes for the

purpose of intimidating the customers of the complainants and deterring them from purchasing or dealing in said Ariosa, issued, or caused to be issued, over his signature, to dealers in and vendors of, Ariosa, and others, within Ohio, a certain circular letter or statement in the words and figures following, to wit:

"STATE OF OHIO,
"OFFICE OF DAIRY AND FOOD COMMISSIONER.

"DEAR SIRS: Replying to your inquiry about the coffee situation, "would say that this matter is now under consideration and investigation by the chemists of this department. As soon as conclusions are reached, a circular notice will be sent to all the jobbers in "Ohio, and a sufficient number will be furnished to supply all their "salesmen.

"I might say that the following firms have agreed to accept the "law as construed by this department: Andrus, Scofield & Co., Columbus; Dayton Spice Mills, Dayton; Woolson Spice Co., Toledo.

"W. F. McLaughlin & Co., of Chicago, have agreed to comply "with the laws as soon as construed by the court.

"The only firm that has refused, and still refuses to accept the "ruling of this department, or abide by the laws of the State as "construed by our supreme court, is Arbuckle Bros., of New York.

"Very truly yours, J. E. BLACKBURN,
"*Dairy and Food Commissioner.*

"Columbus, Ohio, February 5, 1901."

10 Said circular letter or statement is wholly false in this, to wit, that complainants have not at any time refused, and still refuses, to accept said construction of — Ohio, as construed by the supreme court of said State, and that, as complainants are informed and believe, the Woolson Spice Company has not agreed to accept the said law as construed by respondent, but on the contrary, has refused, and still refuses, to accept said construction of said law, and still continues to sell, in the State of Ohio, coffee prepared and glazed by processes for a long time used by them.

Said circular, while purporting to be an answer to an inquiry, was in fact by said respondent sent generally to jobbers and dealers in food products within Ohio, few, if any, of whom had, in fact, inquired as therein stated; and as complainants are informed and believes, was so circulated without such inquiry, -or the purpose of intimidating complainants and their customers, and with the effect of injuring complainants and their property.

Said circular, by falsely and wrongfully singling out complainants as alone refusing to accept the ruling of the respondent and to abide by the laws of Ohio as construed by the supreme court thereof necessarily and inevitably implies that of the food products manufactured and sold by the manufacturers therein mentioned, those manufactured and sold by complainants, and more particularly the product Ariosa, alone fall short of the standard of purity and wholesomeness imposed by said statute; thus further wrongfully and falsely implying that said product Ariosa is inferior in quality, grade, purity

and wholesomeness to the products manufactured and sold by such other manufacturers, whereas in fact the standard of said Ariosa as a pure, wholesome, healthful and nutritious article of food and as conforming to the requirements of said statute, properly and rightly construed, is at least as high as that of any like products manufactured and sold by the manufacturers aforesaid.

In pursuance of his wrogful and unlawful intention of intimidating the complainants and their customers in Ohio, and of deterring them from the purchase and sale of Ariosa, respondent, unless restrained therefrom by an order of this honorable court, will, as announced in his aforesaid circular, issue other and further circulars to dealers in food products in Ohio in large quantities, and will cause the same to be widely published and distributed throughout Ohio and elsewhere; and such subsequent circular will be directed against the complainants alone, with the intent, purpose and
11 effect of discriminating against complainants and their said product and of irreparable injury — the sale thereof, the value of the existing — thereof and the trade of complainants and the good will of their business.

By said circular the respondent accused and threatened to accuse complainants and the dealers in Ohio, in complainants' products of a crime punishable by law, and to do an injury to the property of complainants and of the dealers aforesaid, with intent to compel complainants and the dealers aforesaid to do acts against their will, to wit: to cease from selling and offering for sale said Ariosa, within Ohio.

XIV. Any prosecutions, as threatened by said respondent, under his false and erroneous construction of the said statute, will be wholly without authority of law, and will deprive complainants of their property, to wit: the value of the Ariosa already manufactured, now in the possession of complainants and awaiting sale, and the value of such Ariosa in the hands of dealers and vendors thereof throughout the United States, and more particularly in Ohio, and complainants' trade and the good will of their business of vending said product within said State of Ohio, without due process of law.

XV. The unauthorized, unlawful and erroneous statements, menaces and threats of prosecution made by respondent as aforesaid by intimidating complainants and their customers and the vendors or dealers in, and consumers of, Ariosa, within Ohio and elsewhere and by deterring them from vending, purchasing or using said Ariosa, thus decreasing the repute and sale of the said Ariosa and diminishing complainants' trade and the good will of their said business, have worked, do and will hereafter unless restrained by the orders of this honorable court, work irreparable injury to the said property rights of the complainants, and still further and irreparable injury will accrue thereto if respondent be permitted to institute or conduct proceedings or prosecutions against the vendors of, and *permitted to institute or conduct proceedings or prosecutions against the vendors of, and* dealers in, said Ariosa, as he has threatened and still threatens to do.

XVI. Said statute, construed as respondent claims it should be, is

in conflict with the fourteenth amendment to the Constitution of the the United States, and void, in that it would deprive complainants of their aforesaid property by prohibiting them from selling in Ohio, and dealers in, and vendors of, food products from purchasing from the complainants pure food products, which are ordinary ar-
12 ticles of food and are not injurious to health, to wit: coffee, sugar and eggs and a mixture of compound recognized as an ordinary article and ingredient of food and not injurious to health and all the ingredients of which are recognized as ordinary articles of food and are not injurious to health, and from dealing in the same, in Ohio, and by destroying the value of said product as an article of commerce by prohibiting the purchase and sale thereof, and thus would deprive complainants not only of the just and lawful benefits accruing to them by reason of their property rights acquired in said food products as aforesaid, but, further, would largely destroy the market value of the existing stock of Ariosa in the possession of complainants in Ohio and elsewhere and would deny to these complainants and to the dealers in, and vendors of, said Ariosa, within the jurisdiction of the State of Ohio, equal protection of the law.

XVII. Ariosa is manufactured and treated, according to the aforesaid process, at complainants' factories in New York and Pennsylvania, and not in Ohio. After being so manufactured and treated, it is at said factories packed in packages, and is, in said original packages, shipped by complainants into Ohio; and is sold in such original packages; and said statute, if construed as the respondent herein claims it should be, is a regulation by the said State of Ohio of interstate commerce, and is repugnant to, and in violation of the third clause of section eight of article one of the Constitution of the United States, and void.

XVIII. Owing to the number of dealers in, and vendors of, Ariosa in Ohio, who will, under the respondent's wrongful and erroneous construction of said statute, be liable to prosecution, and will be so prosecuted, if the said respondent be permitted to carry out his aforesaid threats and menaces, a multiplicity of suits will necessarily arise involving identical questions, relating to the existence, constitutionality, construction, scope and effect of said statute and to the complainants' rights of property in Ohio, and to the effect thereon of said statute; and thereby complainants' rights of property in Ohio, *and to the effect thereon of said statute; and thereby complainants' property rights* will be determined in litigations to which complainants will not be, and cannot be, parties.

The interests of such dealers are, in many cases, not in common with, nor representative of, the interests of complainants, and, therefore, there is great and imminent danger that in many of such
13 suits and prosecutions no defense will be made by the defendants therein, either through lack of interest, or in wrongful collusion and conspiracy with the respondent, and that thereby the question of the construction of said statute will in many of said suits and prosecutions not be properly or skillfully presented and passed upon; all to the great and lasting prejudice and damage of com-

plaintants, who have not now, and will not thereafter have any adequate remedy at law in the premises.

Although such prosecutions shall uniformly result in the acquittal of the persons thereby charged, yet by reason of the multiplicity thereof and the avowed determination of the respondents to prosecute all persons selling or offering for sale, in Ohio, complainants' said product, the mere wrongful prosecutions will result in deterring many, if not all dealers in good products, in Ohio, from dealing in Ariosa, and thereby prevent complainants from selling their said product in said State, to complainants' great and irreparable injury.

XIX. The matter in dispute herein, exclusive of interest and costs, largely exceeds the sum of or value of two thousand dollars in this, to wit: that by the said statements, menaces and threats of the respondent and the prosecutions threatened to be instituted by him, complainants' trade, in Ohio and elsewhere, the good will thereof, and the market value of the existing stocks of Ariosa, now in the possession of complainants have been, and will be, damaged, depreciated and diminished in value to the extent of more than one hundred thousand dollars.

In consideration whereof, and forasmuch as your orators are without remedy in the premises at law, and are relievable only in a court of equity, where matters of this kind are properly cognizable and forasmuch as the true construction of the said statute is:

(*a.*) That said statute was not intended to, and does not, make unlawful such preparation and display of food products, sold, or offered for sale in Ohio, as does not constitute a fraudulent misrepresentation of the quality, amount, or some characteristic thereof;

(*b.*) That, so long as any food product, or compound or mixture, being an ordinary article, or ingredient of article of food shall be distinctly labeled as a mixture or compound, in accord with the fact, and with the formula giving the name and per cent. of each ingredient therein, and shall not be injurious to health, such article of food product, mixture or compound is not within the prohibition of the said statute.

14 And forasmuch as the sale and offering for sale of Ariosa so treated and labeled, as above set forth, and as to make and leave plain and visible, and not to hide, the quality or characteristics of coffee thus treated and coated, is not prohibited on the ground that damage, or inferiority, is concealed, or that by any means it is made to appear better, or of greater value, than it really is.

And forasmuch as Ariosa is, and each of its ingredients is, an ordinary article, or an ordinary ingredient of article of food and said Ariosa is distinctly labeled in such manner as to set forth the name and per cent. of each and every ingredient therein, and is not injurious to health; and the manufacturing for sale, the offering for sale, or the selling of the same, is not forbidden by said statute.

And to the end that your orators may have all proper relief and that said respondent may answer in the premises, but not under oath, an answer under oath being expressly waived;

Your orators pray that said Joseph E. Blackburn, dairy and food

commissioner of the State of Ohio, respondent herein, be provisionally and perpetually enjoined:

1. From stating or charging that complainants' said food product, Ariosa, being a compound of pure roasted coffee, mixed, treated, coated and glazed with a preparation of sugar and eggs, according to the formula and by the process hereinbefore set forth, is an article of food adulterated within the meaning of said statute, and that the use of complainants' said process of coating and glazing the coffee, constituting the chief ingredient of Ariosa, with a preparation of sugar and eggs, as hereinbefore more particularly described, constitutes a violation of said statute, and that the importation of said Ariosa into Ohio, or the selling of, or offering for sale, the same constitutes a violation of said statute.

2. From charging the complainants herein, or any of them, or said firm of Arbuckle Brothers, or any dealer in Ariosa, with violating said statute by selling, or offering for sale, Ariosa, or with adulterating food, in violation of said statute, by reason of the aforesaid treatment and coating of the coffee forming an ingredient of Ariosa with a preparation aforesaid.

3. From charging the complainants, or any of them, or said firm of Arbuckle Brothers, with violating the said statute by adopting and using said process of coating above described or by selling, or offering for sale, Ariosa, so glazed.

4. From charging any dealer in Ariosa with the possession, offering for sale, or sale of, an adulterated food product, within the meaning of said statute, in having in their possession, offering for sale, or selling Ariosa, so glazed.

5. From menacing and threatening any dealer in Ariosa so glazed with prosecution for having in his possession, offering for sale, or selling such Ariosa.

6. From instituting, or commencing, against any person, partnership or corporation, having in his, their, or its possession, offering for sale, or selling Ariosa, any action, suit, proceeding or prosecution, based upon the treatment and coating of the coffee forming an ingredient of said Ariosa with a preparation of sugar and eggs, according to the formula and by the process, more particularly above described; and

7. That your orator may have such further relief as to the court shall seem equitable and proper in the premises.

And inasmuch as serious, immediate and irremediable damage will otherwise ensue to your orators, your orators pray that a temporary restraining order be issued upon the filing of this bill, to the same effect and purpose as hereinbefore prayed for, to continue in force until an application can be heard in due course for the granting of a preliminary injunction.

May it further please your honors to grant unto your orators a writ of subpœna, issuing out of and under the seal of this honorable court, directed to the said respondent, Joseph E. Blackburn, dairy and food commissioner of the State of Ohio, commanding him, on a day certain, to appear and answer unto this bill, and to abide and

perform such decree, in the premises, as to the court shall seem proper and required by the principles of equity.

PECKHAM, WARNER & STRONG AND
BROWN & GEDDIS,
Solicitors for Complainants.

CLARENCE BROWN, *Of Counsel.*

February 20, 1901.

THE STATE OF NEW YORK, } ss:
County of New York, }

John Arbuckle, being duly sworn, says that he is one of the complainants above named; that he has read the foregoing bill of complaint and knows the contents thereof; that all the matters and things therein set forth are true, except as the same are
16 therein alleged to be on information and belief and as to them he believes the same to be true.

JOHN ARBUCKLE.

Subscribed in my presence and sworn to before me this 18th day of February, 1901.

[SEAL.] JOHN HALL JONES,
Notary Public in and for New York County, New York.

And afterwards, to wit: on the 21st day of February, A. D. 1901, there was issued out of the clerk's office of said court, our certain subpœna in chancery, directed to the marshal of the district and against the defendant herein, said subpœna is clothed in the words and figures following, to wit:

Subpœna in Chancery.

THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Eastern Division, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon Joseph E. Blackburn, dairy and food commissioner of the State of Ohio, citizen of and resident of the State of Ohio, if he be found in your district, to be and appear in the circuit court of the United States, for the eastern division of the southern district of Ohio, aforesaid, at Columbus, on the first Monday in May next, to answer a certain bill in chancery, filed and exhibited in said court, against him by John Arbuckle, William V. R. Smith, James N. Jarvie and William A. Jamison, partners as Arbuckle Brothers, citizens of and residents of the State of New York.

Hereof you are not to fail under penalty of the law thence ensuing.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 21st day of February, A. D. 1901, and in the 125th year of the Independence of the United States of America.

Attest:

[SEAL.]

B. R. COWEN, *Clerk*,
By C. P. WHITE, *Deputy*.

17 *Memorandum.*

The said defendant is required to enter his appearance in this suit in the clerk's office of said court on or before the first Monday of April, 1901, otherwise the said bill may be taken *pro confesso*.

B. R. COWEN, *Clerk*,
By C. P. WHITE, *Deputy*.

Endorsed: Fifty dollars deposited security for all costs for which the plaintiff may be liable in this suit.

And afterwards, to wit: on the 21st day of February, A. D. 1901, the following notice was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Notice, &c.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE ET AL.
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio. } Notice. No. 985.

Joseph E. Blackburn, respondent:

Please take notice that an application for a preliminary injunction will be made in the above-entitled case before the Honorable A. C. Thompson, district judge, at chambers, in the United States court-rooms, in the city of Cincinnati, Ohio, on Saturday, the 23rd day of February, A. D. 1901, at ten o'clock a. m., or as soon thereafter as counsel can be heard; and that affidavits will be read upon said application.

Columbus, O., February 21, 1901.

PECKHAM, WARNER & STRONG,
BROWN & GEDDES,
HARRISON, OLDS AND HENDERSON,
Solicitors for Complainants

18 *Return of Service.*

THE STATE OF OHIO, }
Franklin County, } ss:

William G. Brossman, of lawful age, being first duly sworn, says that on the 21st day of February, 1901 at two minutes before 10

o'clock a. m., he served the within notice upon said Joseph E. Blackburn, respondent in the within-entitled case, by personally handing to him a full and true copy of said notice.

WILLIAM G. BROSSMAN.

Sworn to before me and subscribed in my presence by said William G. Brossman, this 21st day of February, 1901.

[SEAL.] JOHN T. ROGERS,
Notary Public in and for Franklin County, Ohio.

And afterwards, to wit: on the 25th day of February, A. D. 1901, came the marshal of the district to whom the aforesaid subpœna was in form directed and returned the same into the clerk's office of said court, with his proceedings thereon endorsed, clothed in the words and figures following, to wit:

Marshal's Return.

Return.

Received this writ at Columbus, Ohio, on the 21st day of February, 1901, and on the same day of February, 1901, I served the same on the within-named Joseph E. Blackburn, dairy and food commissioner of the State of Ohio, by personally handing to him a true copy of the same, with all the endorsements thereon.

V. J. FAGIN,
U. S. Marshal, S. D. O.,
By ALBERT BAUERM, *Deputy.*

Fees—total: $2.22.

And afterwards, to wit: on the 9th day of March, A. D. 1900, the following amended bill was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

19 *Amended Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE ET AL., Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent. } No. 985.

Amendment to bill of complaint.

To the honorable the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

Said complainants farther and by way of amendment of, and addition to, their bill of complaint herein, say.

XX. The wrongful acts which said respondent threatens to do, and unless restrained, will do, as in complainants' said bill of com-

plaint alleged, will make unmarketable in Ohio, and to a very large extent impair and destroy the market value of the large stocks of Ariosa which complainants now have on hand in Ohio, and will, to a large extent, deprive them of their said business, and the good will thereof, in Ohio, and greatly injure if not wholly destroy, the value of the same, and enable complainants' competitors, selling in Ohio coffees treated by processes similar to, but not identical with, complainants' said process, to obtain complainants' said business, which can only be regained after long time and at great expense, and complainants will be put to other great expense in defending their said property rights in Ohio. And if, pending the final determination of this cause, said respondent shall be permitted to commit the threatened wrongs, the same will, as complainants are informed and believe, damage complainants to the extent of more than one hundred thousand dollars, an amount largely in excess of respondent's ability to respond in judgment and thereby complainants will suffer irreparable injury unless a preliminary injunction shall be granted herein.

And, therefore, as well as because of the facts alleged in their said bill of complaint, complainants, pray that said respondents be provisionally enjoined, as in and by their said bill prayed.

PECKHAM, WARNER & STRONG,
BROWN & GEDDES,
Solicitors for Complainants.

JOHN DELBITT WARNER,
CLARENCE BROWNE,
Of Counsel.

20 THE STATE OF OHIO, } ss:
County of Lucas, }

Frederick L. Geddes, being duly sworn, says that he is one of the solicitors of the complainants above named; that he has read the foregoing amendment of, and addition to, said complainants' bill of complaint, and knows the contents thereof; that all the matters and things therein set forth are true, except so far as the same are therein alleged to be on information and belief and as to them he believes them to be true.

FREDERICK L. GEDDES.

Subscribed in my presence and sworn to before me this eighth day of March, 1901.

[SEAL.] HENRY C. TRUSDALL,
—— *in and for Lucas County, Ohio.*

And afterwards, to wit, on the 16th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit

Affidavit of Joseph E. Blackburn, Respondent.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE ET AL., Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent. } In Equity. No. 985.

Affidavit of Joseph E. Blackburn.

STATE OF OHIO, *Franklin County,* } *ss:*

Joseph E. Blackburn, being first duly sworn, deposes and says that he is the respondent herein in official capacity *and* dairy and food commissioner of the State of Ohio, duly elected, qualified and acting.

Affiant further says that he is unable, from his own knowledge, to admit or deny the three allegations of the complainants' bill of complaint, with respect for the number of years last past that
21 the complainants have vended their coffee, called "Ariosa," but that the truth and fact is that the coffee purporting to be "Ariosa" which has been brought to affiant's notice is not a "compound" as that word is used in the statutes of the State of Ohio known as section 4200–'6, but that on the contrary the said "Ariosa" consists of a cheap and inferior grade of coffee which is coated and covered with glutinous mixture, for what purpose, affiant deems it unnecessary to state, but with the manifest result that by such glutinous coating and covering, the inferiority of said coffee, is concealed, and it is made to appear better and of greater value than it really is. Affiant further says that the naming and designing of said coffee as "Ariosa" is a mere trick and subterfuge adopted by the complainants for the purpose of enabling them to defeat the said statute and that the name "Ariosa" is known to the entire trade and especially the grocery trade as the designation of Arbuckle's brand of coffee.

Affiant further says that no good, high and meritorious grades of coffee are so coated or covered, but the same are all sold on the market, in their natural state, without any coating or covering whatever, and that it is not necessary, in order to preserve the product from deterioration so to coat and cover the said coffee; and that if the object of said coating and covering were to preserve said product, many much more economical and expeditious methods could easily be used which would not cause the amount of deception and concealment which is caused by the complainants' method.

As to the seventh allegation of the complaint, affiant says that in addition to the four methods of adulteration therein described, there are many other methods of treatment, all of which the affiant is en-

deavoring to correct and prevent, in so far as they violate the laws of the State of Ohio.

In regard to the complainants' eighth allegation, affiant denies that the practices of complainants are used solely for the purpose and with the effect as therein stated, but further says that the greatest effect of said process as is well known is to cause the said coffee to appear to be of greater value than it really is, and to conceal its gross inferiority, but whether or not affiant may be right and may be rightly advised by the testimony of those competent to judge and give evidence, it is the sole desire of this affiant to enforce the laws of the State of Ohio impartially, honestly and with the due regard for the rights of all citizens and persons, including the complainants.

22 In answer to complainants' tenth allegation, affiant says that he is unable to state as to how many millions of pounds of the stock is now in Ohio, or how many hundreds of thousands of dollars may be invested in the State of Ohio, or how many millions of dollars may be invested in the State of Ohio, or how many millions of dollars may be invested in the United States, but affiant believes that the laws of the State of Ohio should be enforced as against such product in the same impartial manner as if the complainants' stock were much less and of more insignificant amount, for the reason that the statutes of said State do not discriminate in favor of persons who have a large trade and against persons who have a small trade, or in any other manner.

In regard to the eleventh allegation in the bill of complaint, the affiant says that the duty of construing the provisions of the statutes of Ohio, are for the various courts and that it is merely the duty of affiant to institute such actions as sound discretion and good advice would suggest and to abide at all times with the decisions and construction of the provisions of the statute as held by the courts of proper jurisdiction.

Affiant denies that he has menaced and threatened to prosecute dealers and vendors of "Ariosa" in Ohio. Affiant avers that the only expressions which he has made regarding "Ariosa" have been given in answer to requests for ruling from his department made by complainants, or in answer to similar requests made by jobbers in the State of Ohio; that all expressions made and acts performed by affiant have been actuated solely by affiant's wish and determination to perform the duties devolving upon him by law as dairy and food commissioner of the State of Ohio.

Affiant further says that personally he does not prosecute vendors of foods, but that the two assistant commissioners and the inspectors who are appointed and employed according to law, have the discretion and the duty imposed upon them of taking samples of food at such times and places as *in* their judgment suggests and the prosecutions are made upon the advice of the attorneys of the department, located in various parts of the State; and affiant does not know and cannot admit that dealers in the complainants' article of food may doubt the healthful character of said food, nor that they may cease

to purchase the complainants' particular brand of food, and affiant therefore denies the same.

Affiant says that in regard to said circular in the thirteenth
23 allegation, he denies all the allegations following said circular, especially that part thereof contained on page fourteen of the printed bill of complaint.

Affiant denies the statements contained in the fourteenth allegation of the bill of complaint.

Affiant denies the statements contained in the fifteenth allegation of the bill of complaint.

Affiant denies the statements contained in the sixteenth allegation in the bill of complaint, except in so far as the same contains mere descriptive and irrelevant matter.

Affiant denies the statements contained in the nineteenth allegation.

And coming now to the amendment to the bill of complaint filed herein March 9th, 1901, affiant denies each and all of the statements and allegations therein contained.

Affiant further says that he could not at this time make any statement as to what prosecutions may be made by the department or the number of such prosecutions, and especially is affiant unable to admit or to now predict what might be the duty of the department and course of action in regard to the complainants' products, except in this, that it will at all times, in so far as it is able, seek to carry out and execute in a proper and lawful manner, the laws of the State of Ohio, and further to perform the duties upon the various subjects under its particular province from day to day as circumstances may require.

JOSEPH E. BLACKBURN.

Sworn to before me and signed in my presence by the said Joseph E. Blackburn, this 13th day of March, A. D. 1901.

[SEAL.] DAVID A. JONES,
Notary Public, Franklin County, Ohio.

24 And afterwards, to wit, on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following to wit:

Affidavit of William A. Jamison.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, and William A. Jamison, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of William A. Jamison.

STATE OF NEW YORK, *County of New York*, } *ss*:

William A. Jamison, being first duly sworn, says that he is a resident of the city of New York, borough of Brooklyn, State of New York, and is, and has been since the year 1891, a member of the firm of Arbuckle Brothers, one branch of whose business consists in the manufacture and sale of roasted coffee of the quality and brand known as "Ariosa."

The deponent is, and since the year 1891 has been, on behalf of his said firm an extensive dealer in green coffee and since said time has been, and still is, familiar with the various grades of green coffee on the market, and their relative characteristics and worth.

Since the year 1891, when deponent first became a member of the firm aforesaid, he has been familiar with the method of manufacture of the said "Ariosa," including the processes by which, and the formula according to which, the said secret was, and still is, roasted, treated and packed; and that, for the last six years, deponent has been in responsible charge of the manufacture of the said "Ariosa," having the personal direction of each branch thereof, including the process of glazing, or coating, at the New York manufactory of the said firm where most of the "Ariosa" sold in the State of Ohio is manufactured.

That during the whole of the time that deponent has been a member of the said firm, as aforesaid, the said "Ariosa" has been exclusively composed of sound coffee, well and evenly roasted, and carefully and uniformly glazed and coated with a preparation of sugar and eggs of good quality and in equal proportions.

That said process of coating and glazing was, and still is, adopted and used by said firm for the purposes, and with the effect following, to wit:

(1.) Hermetically sealed the pores of the roasted coffee and thus retaining in said coffee its original strength and aroma any length of time.

(2) Preventing the absorption *of* said coffee of any noxious, injurious or unwholesome flavors.

(3.) Saving to the consumer the additional cost of eggs for settling said coffee, when prepared for consumption.

That said glazing or coating is composed of healthful and wholesome ingredients, as aforesaid, and is wholly transparent, and was not by said firm intended to, and does not, in any way, conceal, or misrepresent, the true appearance, grade or quality of said coffee, but on the contrary, brings out more strongly the original grain and characteristics of said coffee, making it easier to detect any imperfect black or yellow beans therein contained.

That during the time deponent has been a member of said firm, every effort has been made to maintain the grade of the coffee used in the manufacture of said "Ariosa" and that said grade has been maintained, subject to inevitable slight changes therein, caused by the variation in quality of the coffee crops of the different years in which such brand has been manufactured.

That most of the "Ariosa" sold in the State of Ohio is roasted and prepared at the manufactories of deponent's said firm in the city and State of New York, and is there packed in one-pound packages, in which original packages it is shipped into said State of Ohio, and sold to the private consumer.

That prior to the year 1894, a certain statement and affidavit was printed upon each one-pound package of the said "Ariosa" being in words and figures as follows, to wit:

"*Ariosa*

"Is made from coffees selected especially for their strength, flavor, "and superior drinking qualities. Coffee, when roasted, is porous, "and, unless prevented, loses its best qualities and absorbs others, "which are injurious to it. By our process of hermetically sealing "the pores of roasted coffee we secure a threefold object:

"1st. The retention of the full strength and aroma for any length "of time.

"2nd. The prevention through absorption of any injurious "flavors.

"3rd. The saving to the consumer of the additional expense of "eggs incurred when any other coffee is used.

"'Ariosa' is self-settling.

"Choice eggs and pure 'A' sugar are the only articles used in ob- "taining these three important results.

"Four pounds of roasted coffee go as far as five pounds green, as "coffee loses 20 per cent. in roasting."

"Personally appeared before me, James J. Ferris, a notary public "of New York and Kings counties, *ss.*, Charles Arbuckle and John "Arbuckle, and, both being duly sworn, do depose and say, that "every one-pound package of roasted coffee, bearing the name 'Ar- "buckle,' is made from pure, sound coffee, and is absolutely free "from all poisonous coloring substances which are now being so "largely used to improve the appearance of coffee. They further "depose and say that coffee, when roasted, is porous, and loses its "strength and flavor; to prevent which they hermetically seal the

" berries with a preparation composed solely of choice eggs and pure " white sugar, and that this preparation also clarifies or settles the " liquid coffee.

(Signed) " CHARLES ARBUCKLE.
" JOHN ARBUCKLE.

" Sworn and subscribed before me this the second day of August, " 1888, and I further certify that the above affiants are personally " known to me.

" In testimony whereof, witness my hand this day and date above " written.

" JAMES J. FERRIS,
"*Notary Public, Kings and New York Counties.*"

and that since said year of 1894, the following statement has been printed on every package of "Ariosa" manufactured and sold by deponents' said firm, to wit:

"*Ariosa*

" Is a compound made from coffee, sugar and eggs. The coffees are " selected especially for their strength, flavor and superior drinking " qualities, are pure, sound coffees, and absolutely free from all " poisonous coloring substances which are now so largely used to " improve the appearance of coffee. Coffee, when roasted, is porous,
" and, unless prevented, loses its best qualities, and absorbs
27 " others which are inferior to it. By our process of her-
" metically sealing the pores of roasted coffee, we secured a " three-fold object.

" 1st. The retention of the full strength and aroma for any length " of time.

" 2nd. The prevention, through absorption, of any injurious fla- " vors.

" 3rd. The saving to the consumer of the additional expense of " eggs, incurred when any other coffee is used.

" 'Ariosa' is self-settling.

" Choice eggs and pure granulated sugar are the only articles " used in hermetically sealing Arbuckle's Ariosa coffee.

" *Formula.*

" Coffee	99278
" Eggs	00361
" Sugar	00361

" Four pounds roasted coffee go as far as five pounds green, as " coffee loses 20 per cent. in roasting."

That the facts stated in each of the affidavits or statements, above set forth, are true, and are a true statement of the process and formula, by and according to which the said "Ariosa" has been heretofore, and now is, manufactured, and the reasons for, and the effect of, the use of said process of coating and glazing.

WILLIAM A. JAMESON.

Sworn to before me and subscribed in my presence this 18th day of February, A. D. 1901.

[SEAL.] JOHN HALL JONES,
Notary Public in and for New York County, New York.

28 And afterwards, to wit, on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of John De Witt Warner.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, and William A. Jamison, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of John De Witt Warner.

STATE OF NEW YORK, *New York County,* } *ss:*

John De Witt Warner, being duly sworn deposes and says, he is upwards of twenty-one years of age; that he resides in the city, county and State of New York, and is an attorney and counsellor at law, having his office at No. 111 Broadway, city and county of New York; that he is one of the legal advisors of the firm of Arbuckle Brothers, of the city of New York, manufacturers and vendors of "Ariosa."

Respondent was informed on or about the 2nd day of January, 1901, that Joseph E. Blackburn, dairy and food commissioner of the State of Ohio, had issued to the vendors of and dealers in coffee in the State of Ohio a certain circular, reading as follows:

To whom it may concern:

Notice is hereby given that on and after thirty days from date hereof, the statutes (Bates' R. S. sec. 4,200–'6), against the practice of adulterating coffee by manipulation, such as coloring, coating, polishing or powdering, whereby damage and inferiority is concealed, or whereby it is made to appear better and of greater value than it really is, will be strictly enforced.

The following is the law on this subject (Bates' R. S. sec 4,200–'6, paragraph 6):

29 (6.) If it is colored, coated, polished or powdered whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is.

The department holds that it is not a compliance with the foregoing to simply label the article "compound" when coffees are filled, coated and glazed to make them appear better or of greater

value than they really are, and to retain water that has been added to increase weight.

Additional information will be furnished on request.

Respectfully submitted,

J. E. BLACKBURN,
Dairy and Food Commissioner.

Columbus, Ohio, Jan. 1, 1901.

Deponent further says that, pursuant to the request of said Arbuckle Brothers, he visited said Blackburn at his office in the capitol, at Columbus, Ohio, on the 7th day of January, 1901, to inquire as to his purpose in issuing such circular, especially as to said "Ariosa," and deponent offered then to give or to arrange to furnish promptly to said Blackburn such information as he might require, regarding the quality, grade and characteristics of said "Ariosa," and the processes of its manufacture, and to provide all facilities he might require for investigating personally or by representatives, the grade, quality and characteristics of said "Ariosa" and the processes of its manufacture, packing, marketing, et cet-ra, and to give him any other information which he might desire in connection therewith.

That upon said 7th day of January, 1901, after full and repeated interviews with said Blackburn, and after having examined with him the contents of a package of "Ariosa," which said Blackburn had secured, said Blackburn informed deponent that prior to consulting his counsel, and making such tests and inquiries as he might thereafter see fit to make, he, said Blackburn, proposed to "hold his mind open," and not to state or to conclude whether or not said "Ariosa" as manufactured, packed, sold or exposed for sale in Ohio, was objectionable or illegal, or whether or not such manufacture, packing, sale or exposure for sale was a violation of the law of the State of Ohio in the premises.

That deponent thereupon renewed his said offer to furnish said Blackburn all possible information and every facility in the premises, and returned to the city of New York, and advised said Arbuckle Brothers of the facts and circumstances above stated.

JOHN DE WITT WARNER.

30 Subscribed and sworn to before me this 16th day of February, 1901.

[SEAL.] JOHN HALL JONES,
Notary Public, New York County, New York.

And afterwards, to wit: on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of H. W. Wiley.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, and William A. Jamison, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of H. W. Wiley.

DISTRICT OF COLUMBIA, *ss:*

Harvey W. Wiley, being duly sworn, deposes and says: I am of full age, and reside in the District of Columbia; I am, and for the past 18 years have been the chief of the Division of Chemistry in the United States Department of Agriculture. For 15 years last past it has been my occupation to examine food products marketed for consumption in the United States, with special reference to their purity and healthful character; and for that purpose to keep myself informed by analysis, inspection, and all practicable tests as to food products in general, and the conditions which determine their purity or healthful character, both in this country and elsewhere. During the World's Exposition, lately held in Paris, France, I represented the United States Department of Agriculture in charge of the United States Government exhibit of beverages, sugars, candies and other food products.

At the request of Mr. John Arbuckle, one of the complainants in the above-entitled cause, I visited the borough of Brooklyn,
31 New York city, on Wednesday, February 6th, 1901, and there made a careful examination of the "Ariosa" manufactory of Messrs. Arbuckle Brothers, and of the processes by which and the condition under which "Ariosa" was there manufactured and packed for the market.

Said "Ariosa" is a compound or mixture of roasted coffee, eggs and sugar; by far the greater part of its bulk and weight consisting of roasted coffee.

I examined particularly the apparatus for cleaning the green coffee, and investigated the method by which stones and sticks are separated on the one hand, and the dust and light and imperfect berries on the other. I then made an examination of the roasting furnaces to determine the care with which uniformity in the quality of the roasted berries is secured. I found in both these apparatus a perfect adjustment to the desired object, and a method of working which could leave nothing to be desired in the way of securing as near as possible a perfect product.

I next inspected the methods of preparing the coating substances with which the aroma and good qualities of the roasted berries are

preserved. The eggs which are used for — purpose are all perfectly handled, so that any spoiled ones may be removed. The good eggs are then broken and the contents allowed to fall upon a strainer which retains the shells and allows the semi-liquid contents of the eggs to pass through.

The contents of the eggs are mixed with sugar, and enough water to dissolve it, and the whole is beaten into a uniform mass in a mixer. I secured a sample of this mass and subjected it to a chemical examination.

In order to determine the effect of coating the coffee with this material, I took a sample of the roasted coffee as it entered the coating apparatus, and also a sample from the same charge after the coating had been applied and the berries dried for ten minutes in a current of warm air. I brought the two samples, representing the roasted berries before coating — the berries after coating, to Washington for further chemical examination.

I also bought in the open market in Washington, for further comparison, three samples of coffee, viz:

1. A package of Arbuckle's "Ariosa."
2. A package of high-priced coffee, sold as a mixture of Mocha and Java for thirty-five cents per pound.
3. A package of coffee, brand Jav-Mar-Mo.

To determine the effect of the action of hot water upon these samples, they were treated as follows:

32 One hundred grams of each of the samples were placed in a breaker of convenient size. Over each sample 200 c. c. of boiling water were poured. All of which samples were thoroughly stirred with a glass rod, at intervals of a minute for ten minutes. The liquor was then poured off the samples, and they were washed with a small quantity of hot distilled water. The liquor was evaporated to dryness, and the amount of extract calculated in per cent.

The moisture content of each of these samples was also determined, and these data are also found in the table which follows:

Table Showing Percentage of Moisture and Amount of Material Extracted by Hot Water in Five Samples of Coffee.

Serial No.	Description.	Moisture.	Extract.
21337	Arbuckle's roasted, unglazed	2.00%	2.32%
21338	Arbuckle's roasted, glazed	2.26%	3.06%
21339	Jav-Mar-Mo, made by Ed. J. Gillies & Co.	3.33%	2.26%
21340	Arbuckle's Ariosa, bought in Washington market	3.20%	3.45%
21341	Java-Mocha mixture, in bulk, 35c. per pound	2.01%	2.13%

A comparison of the above data shows extremely small quantities of moisture in all the samples, and even in the samples of "Ariosa" bought in the Washington open market, which had probably been kept in stock for a long while, the quantity of moisture which had been absorbed it is seen was extremely small.

It is also evident from an inspection of the table that the digestion of these coffees in hot water takes out a large quantity of the soluble matter which the coffee bean contains. It is seen, therefore

that if these samples are treated with hot water they are so changed in their constitution that they cannot any longer be regarded as typical of the same coffee before treatment. Hence any attempt to determine the original condition of a glazed coffee by treatment with hot water must be futile.

To determine the effect of cold water and tepid water upon the appearance of the coffee beans, samples from the same packages mentioned above were treated as follows:

One hundred grams of each coffee were digested with 200 c. c. of cold water at room temperature, viz: 770 F., for 20 minutes, stirring every minute. Another series of samples from the same packages, of 100 grams each, were treated in the same way with tepid water, that is, at a temperature of 122° F., for 10 minutes, stirring every minute.

33 After the digestion was completed, all the samples were washed with water at the same temperature and the beans were dried. In every case the coffee beans thus treated had a black and forbidding appearance and there was no difference whatever in the appearance of the glazed and the unglazed samples.

The liquors from the digestion were evaporated to dryness and the amount of extract determined. The quantity was not so great as that extract- by the hot water, as was to be expected but it was sufficient to produce the same effect upon the appearance of the beans as was produced by the hot water.

It is evident from the above data that treatment with cold water for 20 minutes and with tepid water for ten minutes have about the same effect upon the appearance of the beans as was produced with boiling water. The coffees which had been previously glazed have exactly the same appearance after this treatment as the unglazed coffees. It is evident, therefore, that any attempt to determine the original condition of the glazed coffee by treating it with cold or tepid water is useless, and any deduction in regard to the original state of such coffee drawn from the results of such an experiment are wholly valueless.

The difference in moisture between the Arbuckle glazed and unglazed coffee is so minute as to be practically negligible. The ordinary errors of analysis, which are unavoidable, might be sufficient to account for a large portion of the apparent increase in moisture in the glazed coffee. Some moisture also is necessarily added in the glazing, and in the samples compared, the berries, after glazing, were allowed to remain in contact with a current of warm air only about ten minutes, whereas, in ordinary commercial operations, they are kept in contact with the hot air until they are perfectly dry. It is evident, therefore, that the process of glazing, as practiced in the Arbuckle factory, does not add to the roasted berry any appreciable content of moisture.

The sample of glazing material, ready for use, mentioned above, was also subjected to analysis, with the following results:

Specific gravity	1,0977
Total solids	32.08 per cent.
Water	67.92 per cent.

34 The amount of this glazing material used for 550 pounds of coffee is ten quarts. Each quart of this material weighs 2.38 pounds, and, therefore, the amount of material added in ten quarts would be 23.8 pounds. Of this quantity 16.16 lbs. are water and 7.64 pounds solid matter. In the process of glazing, therefore, 16 pounds of water are added to 550 pounds of coffee, and this added water is afterwards evaporated by submitting the glazed mass to the action of a current of hot air, leaving deposited as a thin transparent film the albumin and sugar composing the solid matters of the glazing mixture. A glazed coffee, then, can be regarded as a compound, consisting principally of coffee, with a small quantity of albumin and sugar attached.

The process of glazing does not in any way tend to conceal inferiority. On the contrary, the coffee beans of a black color and also those of an exceptionally light color, appear much more distinctly in the glazed than in the unglazed samples; thus the process of glazing only accentuates any difference in color or appearance which may have existed in the original samples.

The mixture of albumin and sugar which is added as a glaze costs a great deal more per pound that the coffee itself. Hence the slight increase in weight which the coffee undergoes by the addition of this thin, transparent film is due to a material which costs a good deal more than the coffee itself. There could, therefore, be no financial fraud in connection with the glazing of this kind. It is plain that the process of glazing coffee results in improving its keeping qualities, in accentuating the difference between the perfect and somewhat imperfect beans which a sample may contain and in adding to the coffee a material which is useful in securing a proper settlement when the beverage is made, but at the same time costs a great deal more than the coffee itself. It is seen that such a process does not partake of the nature of an adulteration in any form or shape. It does not add anything of an injurious character to the food. It does not conceal inferiority. It does not add a cheaper to a dearer substance. On the contrary this added material is wholesome and digestible. It assists in the clarification of the coffee when the beverage is made; it preserves the aroma and flavor of the roasted berry, and prevents the absorption of moisture which would take place on long standing in the air. The use of this glaze is, therefore, distinctly beneficial from all points of view, and cannot be justly objected to, either on the grounds of hygiene or of fraudulent intent.

35 It is clearly demonstrated that the darkness of color and general bad appearance of the coffee beans after digesting with hot water have no relation whatever to the glazing. The unglazed berries show the same appearance as the glazed berries after digestion. Hence any attempt which may be made to show the original character of the berries which have been glazed, by digestion with hot water, is futile, and the deductions which would be made from such an experiment are absolutely worthless in regard to judging of the original qualities of the berries. The digestion dissolves the sugar, caramel, dexterine and other soluble

portions of the exterior part of the berries and leaves the residue black and forbidding in all cases, whether glazed or unglazed.

A comparison of the samples taken before and after the treatment described shows that the glazing of the berries makes their appearance very much less like that of a high-priced coffee than is that of unglazed berries. The process of glazing does not tend in any possible way to make a low-priced coffee resemble in quality, as shown by appearance, a high-priced coffee berry, but just the contrary is the case.

The dark-colored berries in "Ariosa" after glazing are much more highly contrasted with those of ordinary color than are similar berries before glazing in the roasted berries from which "Ariosa" is made. In *light* manner the light-colored berries in "Ariosa" after glazing, are much more highly contrasted with those of ordinary color than are similar berries before glazing in the roasted berries from which "Ariosa" is made. The process of glazing "Ariosa" coffee does not in any way tend to make unusually colored berries resemble those of usual color; but the contrary is the case. The glazing has the effect of rendering more clearly visible any imperfect berries that may exist in any given quantity of "Ariosa."

The result of my inspection, analysis and comparison of samples is, and I so state:

1. The glazing of the roasted berry by the Arbuckles process is conducted with a valuable food substance, which is deposited in an extremely thin transparent film, tending to preserve the aroma and flavor of the berry.

2. The dark forbidding color imparted to the coffee berries by digesting in hot, tepid or cold water is not due in any degree to the glazing, but the natural constitution of the berry which gives off a certain portion of its soluble external constituents to the digestion liquor.

3. The glazing of roasted coffee berries does not have any tendency to make a low-priced berry resemble a high-priced one; but just the contrary effect is produced.

4. The glazing of coffee berries with a thin, transparent
36 film, referred to above, does not tend to cause imperfect or unusually colored berries to resemble the perfect berries of the usual color; on the contrary, the opposite effect is produced.

5. The glazing of the coffee berries by the Arbuckles process is secured by the use of a valuable food material which is useful also in helping to settle the coffee when the beverage is made, and which, therefore, is not in any sense the addition of a cheaper to a dearer substance, and hence this process is devoid of fraud or deception in any particular.

6. Any attempt to determine the original condition of the glazed coffee by treating it with cold, tepid or hot water is useless, and any deductions as to original state or appearance of such coffee after roasting, but before glazing, which might be drawn from the result of such an experiment would be valueless.

7. No appreciable weight derived from moisture is added to and no moisture retained in the coffee by glazing.

HARVEY W. WILEY.

Sworn to before me and subscribed in my presence this 21st day of February, 1901.

[SEAL.] THOMAS J. SULLIVAN,
Notary Public, D. C.

And afterwards, to wit: on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of Clarence Brown.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

JOHN ARBUCKLE ET AL.
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner, etc. } In Equity. No. 985.

Affidavit of Clarence Brown.

THE STATE OF OHIO, *County of Lucas,* } *ss:*

Clarence Brown, being first duly sworn, deposes and says: that he is one of the solicitors of, and of counsel for the complain-
37 ants in the above-entitled suit; that he is informed and believes that in consequence of the acts of said defendant specified in said complainants' bill of complaint in said suit, and in collusion with said defendant, the Dayton Spice Mills Company, a manufacturer of and dealer in package coffee at Dayton, Ohio, did on or about the 12th day of February, 1901, cause to be printed a certain circular letter, a copy whereof is hereto attached marked "A," and on and after said date sent the same generally to grocers and coffee dealers throughout Ohio and elsewhere, together with certain blank forms, copies of which are hereto attached marked "B" and "C" and a certain circular, copy of which is hereto attached marked "D."

CLARENCE BROWN.

Subscribed in my presence and sworn to before me this twenty-second day of February, 1901.

[SEAL.] HENRY TRUESDALL,
Notary Public in and for Lucas County, Ohio.

"A."

Dayton Spice Mills Company,

Coffee-roasters.

DAYTON, OHIO, *February* 12, 1901.

DEAR SIR: We have received hundreds of letters from the retail grocers of the State thanking us for our letter of January 29th, and

the copy of the letter issued by the commissioner of the pure food department of this State, relating to the glazing and coating of roasted coffees, and whilst a number gave us their opinion of the ruling, and in every such case commended same, the great majority simply acknowledged receipt of our letter with thanks. In order therefore to get a full and intelligent expression on the subject from the retail grocers of the State who are vitally interested in the sale of pure goods to their customers, we ask you to make the following test of any glazed coated coffee either in package or bulk that you have on hand, and give us the result on blank herewith enclosed for that purpose.

Test: Take a handful of glazed or coated coffee out of pack-
38 age and put it in a glass of cold or warm water, allowing it to remain only long enough to remove the glaze or coating; pour off the liquid into another glass and keep it for a day, then examine. Take the coffee from which glaze or coating has been removed and let it thoroughly dry, then place it alongside of and equal amount of glazed or coated coffee taken from same package and note the result. If you think the glazing or coating has covered up many imperfections and made a poor grade of coffee to appear much better than it actually is. say so, or if you think it has improved the coffee and does not deceive as to grade used, be equally frank in saying so.

As advised you in our former letter, all coffees roasted by us will comply strictly with the law, and we ask you to give them a trial. We enclose order blank for that purpose, and as a special offer and inducement for an order to be shipped direct to you from our mill, to be billed through any wholesale grocer, we will furnish with 1 case, 100 lbs. (1-lb. tin cans) Dutch Java blend, 1,000 circulars like the enclosed, or with 1 case, 60 lbs., 500 circulars; with 1 case, 100 lbs., (1-lb. packages) Jersey coffee, 1,000 circulars like enclosed, or with 1 case, 60 lbs. 500 circulars. We will prepay freight to nearest railroad station. Be sure to state what wholesale grocer you desire to have us bill through. We hope to receive your order and also the result of test we have asked you to make. Awaiting your reply, we remain,

Respectfully yours,

DAYTON SPICE MILLS COMPANY.

N. B.—We ask you specially to make the test requested and report results. We enclose addressed envelope for that purpose, and if you send us an order in addition it will have our prompt and careful attention, and be appreciated.

"B."

Test.

Date, ——, —— —, —.

The Dayton Spice Mills Co., Dayton, Ohio.

GENTLEMEN: I have this day made test of the following brands of roasted coffee, glazed or coated, and herewith give you results:

Brands of coffee tested ——.

How long did you allow coffee to remain in water? ——.

39 Did you use cold or warm water? ——.

Was glaze or coating thoroughly removed? ——.

Did you pour off water in separate glass? ——.

What was the color and nature of the liquid after standing a day? ——.

Would you like to drink it? ——.

Did you thoroughly dry coffee? ——.

Did you compare it with equal amount of glazed coffee taken from same package? ——.

How did it compare? ——.

In your opinion does the glazing or coating of roasted coffee cover defects and make it possible to deceive the consumer? ——.

After making this test would you prefer to buy your roasted coffees plain, without glazing or finish, of any kind? ——.

Remarks: ——.

Respectfully yours, —— ——.

Post-office ——.

"C."

Order Blank,

With special advertising matter for direct shipment.

——, —— —, 1901.

The Dayton Spice Mills Company, Dayton, Ohio.

GENTLEMEN: Please ship me to —— (give railroad station and county) —— cases 100 pounds (1-lb. tin cans) Dutch Java blend coffee, with 1,000 special advertising circulars.

—— cases 60 pounds (1-lb. tin cans) Dutch Java blend coffee with 500 special advertising circulars.

At $16.50 plus rate of freight as shown on equality freight rate books, without rebate. 60 lbs. cases 1–10c. higher.

—— cases 100 pounds (1-pound packages) Jersey coffee with 1,000 special advertising circulars.

—— cases 60 lbs. (1-pound packages) Jersey coffee with 500 special advertising circulars.

At 12 cents plus rate of freight shown on equality freight rate books, less rebate of ¾c. per pound. 60-lb. cases 1–10c. higher.

These coffees to be shipped direct, freight prepaid, and billed through —— ——, wholesale grocer.

Respectfully yours, —— ——.

40 N. B.—The above prices are subject to change without notice. All orders will be filled at prices ruling the day they are received.

"D."

The reason why

Jersey coffee

Is the best package coffee made.

The careful attention of all persons interested in the use of pure food is respectfully called to the merits of pure Jersey roasted coffee.

Jersey coffee is recognized everywhere as the standard for purity and excellence among all other brands, and complies strictly with the pure-food laws of Ohio and all other States. The steadily increasing sale and growing favor with which Jersey coffee has met since its first introduction to the public, is not only conclusive evidence of its merit and popularity, but also a gratifying comment on our earnest efforts to supply the public with a pure, clean, strong and fine-flavored coffee at the same price the consumer has been paying for inferior goods. The key to this success is:

First. The most careful selection, in buying, of none but the best grades of sound coffees, celebrated for their strength and fine drinking qualities.

Second. The use of the most improved machinery known and the utmost care and skill in the process of roasting; thereby insuring uniformity and retaining the greatest possible percentage of aroma and strength.

Third. Unsurpassed facilities in all our departments, enabling us to turn out goods at the minimum cost of production.

Fourth. A willingness to sell our goods at a small profit, and an appreciation of the fact that when a consumer asks and pays for good coffee, he should get good, pure coffee, and not a filthy combination of low grade inferior coffees and nameless adulterations skillfully manipulated to represent it.

Jersey coffee

therefore, is pure, strong and fine flavored, and derives these distinctive qualities from an intelligent combination and treatment of fully ripened merchantable coffees, and from nothing else
41 whatever. In every pound package of Jersey coffee we guarantee 16 ounces of pure coffee. Jersey coffee is neither dipped, doped, varnished nor glazed with cheap and nasty mucilaginous substances to reduce the cost and deceive the purchaser, but goes straight from our roasters to the consumer, clean, dry and wholesome.

We do not glaze coffee.

We regard all such productions setting forth the claim that the "aromatic flavor" and "strength" of the coffee is, by virtue of this ingenious doping process, "hermetically sealed" and "retained" as base impositions, unwholesome and nauseating. This assertion can easily be verified by filling a tumbler half full of any glazed coffee, cover with warm water and let it soak for twelve hours, stirring occasionally; then pour off, and examine the liquid thus obtained;

smell of it, taste of it, or put a little of it in your morning cup of coffee; you will then know for a certainty whether or not you want to use glazed coffee.

Jersey coffee stands squarely on its merits, and we are content to abide by the honest verdict of the consumer. If you want a cup of good coffee, buy a package of Jersey, and give it a good honest trial; then, if you like it, you will buy it again, and do us a favor by speaking a good word for Jersey to your neighbor.

Jersey coffee is put up in one-pound packages only. It is guaranteed full 16 ounces of pure coffee in each package and is never sold in bulk.

Jersey coffee is sold by all leading grocers. If your grocer does not keep it, ask him to get it for you.

Very truly yours, DAYTON SPICE MILLS CO.,
Dayton, Ohio.

42 And afterwards, to wit, on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of Henry A. Weber.

In the Circuit Court of the United States for the Southern District of Ohio.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, and William A. Jameison, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Defendant.

Affidavit of Henry A. Weber.

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

Henry A. Weber, being duly sworn, deposes and says: I am of full age and reside at the city of Columbus, in the State of Ohio; I am, and for the past sixteen years have been, professor of agricultural chemistry at the Ohio State university, situate at Columbus, aforesaid.

Prior to that time I had been professor of general chemistry for ten years at the University of Illinois. In and continuously between the years 1885 and 1897 I was the chemist of the Ohio dairy and food commission.

To some extent as professor of general chemistry, and, in especial, as a chemist of the Ohio dairy and food commission, for the last twenty-five years, it has been a part of my occupation and official duty to be and keep acquainted with the more common agricultural and food products, including coffee, produced, marketed or used in the State of Ohio, and with the manufacture, production and marketing thereof, especially as regards their ingredients, purity,

healthful or other character, and the extent to which they are free from or subject to any process or treatment by which appearance may be changed, fraud concealed, substitution made, or anything done or permitted to the prejudice or danger of the health or interest of the public which may purchase or use same.

I am well acquainted with "Ariosa," manufactured by Ar-
43 buckle Brothers. It is a mixture or compound of roasted coffee, eggs and sugar, of which the roasted coffee constitutes far the greater part of its weight and bulk. For more than twenty years it has been largely sold in the open market in Ohio, and elsewhere, for food, and is a well-known food product, and for fifteen years, or a longer period, to deponent's knowledge, said Ariosa has been a food product, well known and generally used in the State of Ohio, sold and purchased under that name; and during that time, I have had it in daily use in my own family for my personal consumption.

At the request of Mr. John Arbuckle, one of the complainants in the above-entitled action, on Thursday, February 21, 1901, at the borough of Brooklyn, New York city, I inspected the Ariosa manufactory of Messrs. Arbuckle Brothers, and each step of the process by which such Ariosa was produced and put up for sale.

The green coffee received at the manufactory is subjected to mechanical treatment, by which, on the one hand, sticks, stones and other foreign substances, and on the other, light and imperfect berries, are removed therefrom. I found this process effectual to these ends. I then examined the roasting furnaces. These are so built and fitted as to secure uniformity in the roasting process to which the coffee berries are subjected, and I found these furnaces well designed and handled to secure a uniform product of roasted coffee.

I also inspected the next process, known as "glazing," to which the berries, when roasted, are subjected. The glazing material consists of eggs, mixed with white sugar, and I saw the process as follows: The eggs are first "candled," and any damaged or spoiled ones thus removed; the good eggs are then broken, the contents strained, mixed with white sugar, and enough water added to dissolve the mixture, which is then beaten in a uniform mass. A certain amount of this is then measured into a cylinder, into which a "charge"—some 500 pounds or more—of coffee berries, roasted by the processes noted, has been placed; the contents of which are then mechanically so stirred as thoroughly to cast the roasted coffee berries with the glazing material mentioned.

Such contents then consisting of roasted coffee mixed and compounded with sugar and eggs, are then mechanically transported to a drying-room, where they are subjected to a hot-air blast until dried, and thence carried by mechanical process to bins from which they are packed in pound packages so covered by a sealed wrapper
as not to disclose the character or appearance of the coffee,
44 but bearing prominently on the outside the name "Ariosa,"
with a statement of the contents of the package, its ingredients and the proportions in which they are mixed or compounded,

a copy of which wrapper, marked "Exhibit A" is hereto annexed as a part of this affidavit.

All these processes are done and completed at the manufactory at Brooklyn, aforesaid. The coffee berries as roasted and submitted to the glazing process are practically dry. The process to which they are subjected in the drying-room, so far removes the water part of the glazing mixture that, as packed for shipment, no material amount of moisture is included with Ariosa.

While the glazing process mentioned would materially retard after absorption from the air of moisture by Ariosa thus prepared, it would not be practicable thereby to retain moisture therein—one constituent of such glazing being sugar, which is so susceptible to moisture that were any material quantity contained in the coffee bean it would tend to disintegrate such glazing, make the coffee berries sticky and induce rapid deterioration in the coffee. As actually treated, however, by the processes mentioned, the roasted coffee thus glazed and dried is protected from loss of its aroma and other coffee qualities, and also against absorption from the atmosphere of other substances, and thus preserved from deterioration; and, at the same time, its use facilitated by the qualities of the glazing which is composed of materials commonly used in preparing roasted coffee for use as a food for drinking purposes.

By the process of roasting coffee berries are, to some extent, disintegrated—that is to say, portions of them reduced to dust or loose porous matter, and either loosened or left so as to be easily affected by being stirred, or especially by being treated with water. Any such treatment of the roasted berries by washing or handling as would remove the glazing therefrom, would naturally so disintegrate the surface of the berry, and so far separate therefrom portions of the roasted berry as to leave it materially changed, both in fact and appearance, from its normal condition after roasting; so that it would not be possible either by washing, handling, or any other means known to me, to produce or restore from Ariosa the roasted coffee berries from which (with eggs and sugar) it had been made, in the condition or with the appearance in which they were after roasting, and before glazing.

The process of glazing does not conceal inferiority in the berries, but brings out and emphasizes any difference from the normal which may exist, acting in this way as a varnish, and showing more plainly in the Ariosa as glazed than in the coffee as roasted before glazing, any coffee beans of exceptionally dark or exceptionally light color.

The mixture (sugar and eggs) added to the roasted coffee to produce Ariosa is of much larger cost than the same weight of roasted coffee. They are well-known, generally used and healthful food products. The effect of glazing is not to assimilate coffee thus treated to coffees of greater market value, but rather the opposite.

In the case of Ariosa thus treated, no substance has been mixed with it so as to lower, depreciate, or injuriously affect its quality, strength or purity; no inferior or cheaper substance has been substituted wholly or in part for it; no valuable or necessary ingredient

has been wholly or in part abstracted from it; it is not an imitation of, or marketed under the name of any other article; it does not consist wholly or in part of any diseased, decomposed, putrid, infected, tainted or rotten animal or vegetable substance, or article, whether manufactured or not, and it is not so colored, coated, polished or powdered as to conceal damage or inferiority, or to be made to appear better or of greater value than it really is. Each ingredient is an ordinary article and ingredient of articles of food, and is not injurious to health.

HENRY A. WEBER.

Sworn to before me, a notary public, in and for the county of New York, N. Y.

[SEAL.] J. E. CONNELLY,
Notary Public, N. Y. Co.

EXHIBIT "A."

"Ariosa"

Is a compound made from coffee, sugar and eggs. The coffees are selected especially for their strength, flavor and superior drinking qualities, are pure, sound coffees and absolutely free from all the poisonous coloring substances which are now so largely used to improve the appearance of coffee. Coffee when roasted is porous, and, unless prevented, loses its best qualities and absorbs others which are injurious to it. By our process of hermetically sealing the pores of roasted coffee we secure a threefold object:

1st. The retention of the full strength and aroma for any length of time.

46 2nd. The prevention through absorption of any injurious flavors.

3rd. The saving to the consumer of the additional expense of eggs incurred when any other coffee is used "Ariosa" is self-settling.

Choice eggs and pure granulated sugar are the only articles used in hermetically sealing Arbuckles' Ariosa coffee.

Formula.

Coffee	99278
Eggs	00361
Sugar	00361

Four pounds roasted coffee goes as far as five pounds green, as coffee loses 20 per cent. in roasting.

One Sieh
No settling

Very fine-flavored.

Arbuckles.

Ariosa coffee.

See notion list in every second package.

Pound.

Andre Siete.
Required.

Money saved by buying roasted coffee.

New York.

Arbuckle Bros.

Pittsburg.

To avoid the possibility of drinking colored and inferior coffee and the certainty of securing coffee having the fine important essentials: purity, strength, fine flavor, uniformity of quality and roasting, and economy.

Buy Arbuckles' one-pound-package coffee.

And afterwards, to wit: on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of John Kinsella.

STATE OF NEW YORK, } ss:
County of Kings, }

John Kinsella, being first duly sworn, makes oath and says that he is a resident of the city of New York, borough of Brooklyn, State of New York, and is, and for twelve years last past has been, in the employ of the firm of Arbuckle Brothers at their coffee manufactory in the city of New York aforesaid; that deponent's duties in said employment are, and for twelve years last past have been, to mix the preparation used for coating and glazing the brand of coffee known as Ariosa coffee, more particularly described in complainants' bill filed herein; that said preparation, or mixture, is composed solely of granulated sugar and eggs, slightly diluted with pure water; that in the course of said process, the eggs — slightly diluted with pure water; that in the course of said process the eggs used therein are by deponent taken from the galvanized iron receptacle, into which they have been broken by other employés of the said firm, and placed in a mechanical mixer; that deponent then adds to them a quantity of granulated sugar, from sugar in barrels supplied to him for that purpose, and a small quantity of water from the regular supply of water used in said borough of Brooklyn for drinking and other purposes; that after mixing the said ingredients as aforesaid, another employé pours said mixture into a certain revolving cylinder, into which he has previously put five hundred fifty pounds of roasted coffee, which is furnished him in the same room by a supply pipe direct from the bins in which said coffee is stored; that said cylinder is then permitted to revolve with its contents for a period of a minute, more or less, mixing the said roasted coffee with the ingredients above described until said coffee is completely covered, coated, sealed and glazed with the same, when said employé discharges it from said cylinder by a discharge pipe into a room below, where said coffee is dried in bins, provided for that purpose.

47

That, during the whole time deponent has been engaged in mixing the glazing ingredients aforesaid and familiar with the process of coating and glazing said coffee as aforesaid, no ingredients, other than pure granulated sugar, eggs of good quality, and a small quantity of water have been used in preparing the mixture for coating and glazing said coffee, as aforesaid; and that deponent mixes all

the said glazing mixture so used, except that mixed by Philip Schrantz.

his
JOHN x KINSELLA.
mark.

Sworn to before me and subscribed in my presence this 18th day of February, A. D. 1901.

[SEAL.] JAMES J. FROST,
Notary Public in and for Kings County, N. Y.

48 And afterwards, to wit: on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of James Turner.

Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE ET AL.
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Defendant.

STATE OF NEW YORK, }
New York County, } *ss:*

James Turner, of lawful age being duly sworn, says: I reside in the city of New York and am the confidential representative in certain matters of John Arbuckle and others, plaintiffs in the above-entitled action, and in especial with their business of manufacturing and selling in Ohio and elsewhere their preparation of roasted coffee known as "Ariosa," referred to in the bill of complaint herein; with which business, manufacture and distribution and its incidents, I am, and for many years last past have been, well acquainted.

The value of said business consists in its good will; that is to say, the extent of the opportunity for profitable transaction thereof, afforded by the repute of said Ariosa as a healthful and useful food product; the extent of the current demands therefor, and such repute and demand as a basis for the expectation of profit reasonably probable to be made in supplying such demand.

Said coffee has been in good repute, to deponent's knowledge, for more than twenty years last past, and as deponent is informed and believes, for a much longer time; and the current demand therefor of late years has been such that the current sales thereof are at the rate in the United States for more than 120,000,000 (one hundred and twenty millions) pounds per annum, and in the State of Ohio of about (14,000,000) fourteen millions pounds per annum; constituting good will in value to exceed $2,500,000, and on which year by year a net annual profit of to exceed $250,000 might reasonably be expected.

To build up such good will there has been, and is, neces-
49 sary not merely care in the manufacture of said Ariosa so to maintain the good quality thereof as to justify such repute, but very large expense to advertise and introduce said Ariosa, and any extent to which either doubt should be thrown upon the healthfulness, purity, or other good qualities thereof, or said Ariosa to any extent excluded from any portion of the present market therefor—especially since, in the last respect, this would necessarily involve the substitution in such market of some rival brand of coffee, the good will of said business would be damaged not merely or mainly in the loss of profit during the time which elapse before a decree herein, but to a much greater extent in the advertising and other expense of reinstating again the market for said Ariosa, in which rival brands of coffee had meanwhile been substituted.

Some two weeks since deponent furnished plaintiffs' counsel in above suits with a summary estimate of the probable loss to plaintiffs in case the preliminary injunction herein asked for should not be granted, and defendant left free to attempt to prevent, by prosecution and otherwise, the sale or offer for sale in Ohio of Ariosa, threatened by him as in the bill of complaint herein set forth, which deponent then estimated and stated to be above $100,000.

Upon further consideration deponent finds such estimate was an underestimate, and in case for any considerable period, say three months or more, the sale or offer for sale in Ohio of Ariosa should be so obstructed, or those concerned therein so menaced by prosecution or otherwise, as to reduce the amount of the present market in Ohio therefor even 50 per cent. thereof, and the substitution had in the market of rival brands to the extent that, under such circumstances would be inevitable, the loss of profit and the expense to plaintiffs of reinstating the good will thus lost would be far in excess of $100,000, and by no practicable means or expenditure could the good will of such business in Ohio be substantially reinstated except by constant effort and after long delay—probably of years.

Furthermore, in case respondent should be permitted to commence prosecutions against those selling Ariosa or offering it for sale in Ohio, the fact that such prosecutions were commenced by a public official—the food commissioner of said State—and under a statute to prevent adulteration of articles of food, as would be the case as is threatened by defendant then by no practicable means or
50 expenditure could plaintiffs avoid an impression widespread throughout the United States, that said Ariosa was adulterated, and an unhealthful or undesirable food product, and the good will of plaintiffs' such business throughout the United States be most seriously affected.

Reasonably to meet and remedy this would require an expenditure in special advertising, and for personal services of agents of far to exceed $100,000; and even with such or any possible expenditure, the present good will of such business would be seriously damaged for a long time to come to the extent in the aggregate, even if such prosecutions were soon terminated and in favor of defendants to an extent of far to exceed $100,000.

In corroboration of the extent to which the fact of the prosecutions threatened by defendant would be used by business rivals to depreciate the good will of plaintiffs' business in respect of Ariosa, deponent has ascertained and now states that—although no prosecution has as yet been had—the business rivals of deponent, especially in the State of Ohio, during the last few weeks, have already had printed and circulated in Ohio and elsewhere great quantities of circulars and advertisements of novel character different from any heretofore used by them, and especially so worded and illustrated as to take advantage in attacking Ariosa and in favor of their brands of coffee, respectively, of the threats of defendant referred to in the bill of complaint herein, and in especial of his threat to prosecute those in Ohio who shall sell or offer to sell Ariosa. Such advertisements have appeared in scores and as deponent is informed and believes, from inquiry, in hundreds of newspapers, mainly in the State of Ohio, of which such advertisements two are annexed as Exhibits "A" and "B" hereof.

To defend and maintain the good will of such business in the State of Ohio under these circumstances, plaintiffs have already made and incurred expenditures of many thousands of dollars, and in case such injunction should not be granted, and defendant instituted prosecutions as threatened by him, defendant would be compelled greatly to increase such expenditure. And if in case by any considerable number of prosecutions by defendant, or continuing threat of such, the market for Ariosa in Ohio should be reduced for any material time below 50 per cent. of its present extent, then the damages to the good will of plaintiffs' such business in Ohio alone would be more nearly $200,000 than $100,000.

JAMES TURNER.

51 Subscribed in my presence and sworn to before me this 23rd day of March, 1901.

[SEAL.] JOHN HALL JONES,
Notary Public, New York County, N. Y.

EXHIBIT.

Not a compound.

Lion coffee is pure coffee not coated with any mixture requiring the package to be labeled "compound" in order to avoid the penalties of the pure-food law.

All so-called "self-settling" coffees deceive the purchaser by making him pay for something that is not worth the money, and when they contain eggs the argument is doubly strong, for the eggs are, of course, factory eggs, which you would not permit on your table.

Do not buy "compounds" of coffee and factory eggs, when for less money you can buy pure, unglazed

Lion coffee.

See for yourself what you are drinking by stirring a handful of "self-settling" coffee in a glass of water; then ask yourself if you want to drink such stuff. The same experiment on Lion coffee leaves the water clear and pure. Try it. It is a simple test that means much to you.

News-Democrat, Canton, Ohio. 3-9-'01.

EXHIBIT.

March 21, 1901.

Joseph E. Blackburn, dairy and food commissioner of Ohio, says: That adulteration and the glazing of coffee must stop—that the process of glazing cheap and inferior grades of coffee with a glutinous mixture is a mere trick and subterfuge—and that no good or high-grade coffees need to be treated in that manner in order to preserve their strength and aroma.

Can you afford to take chances?

The Ohio pure food commissioner further says, that after an examination of Berdan's package coffee, "I have no fault to find therewith."

52 Your grocer sells it. Why not try it? Valuable premiums given free. A list of them in every package.

NOTE.—"Berdan's package coffee" is rapidly becoming as famous as that perfection of high-grade coffees,

Empire blended Java.

Toledo Times.

And afterwards, to wit: on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of George Davis.

In the Circuit Court of the United States for the Southern District of Ohio.

JOHN ARBUCKLE ET AL., Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of George Davis.

STATE OF NEW YORK, }
County of Kings, } *ss*:

George Davis, being first duly sworn, says that he is a resident of the city of New York, borough of Brooklyn, State of New York,

and is, and for fourteen years last past has been, in the employ of the firm of Arbuckle Brothers in said city and State. That deponent now is, and for six years last past has been, by said firm employed in the drying-room in their said factory in the city of New York aforesaid, where the brand of coffee named Ariosa is prepared.

That said coffee is received in the said drying-room through certain feed-pipes from the room above, where another employé of the said firm is employed to and does attend to the coating and glazing of the same, as in the bill more particularly set forth.

Said coffee, after coming down said feed-pipes, is distributed into a number of bins in said room, said bins having a perforated bottom, through which hot air is forced in order to dry said coffee.

53 That, besides deponent, there are five other employés employed at the same work in said drying-room.

That deponent and his fellow-employés in said room constantly examine the coffee in the bins in which it has been placed, and as soon as said coffee is found to be dry, shovel it out into a discharge pipe, which carries it by gravity to the store bins, whence it is taken by other employés of the said firm, and packed in one-pound packages ready for shipment and sale.

That, so long as deponent has been in the employ of the said firm, as aforesaid, the coffee handled by him has been of good quality and grade.

GEORGE S. DAVIS.

Sworn to before me and in my presence subscribed, this 18th day of February, A. D. 1901.

[SEAL.] JAMES J. FROST,
Notary Public in and for Kings County, New York.

And afterwards, to wit, on the 26 day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of John Donovon.

In the Circuit Court of the United States for the Southern District of Ohio.

JOHN ARBUCKLE ET AL., Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of John Donovon.

STATE OF NEW YORK, *County of Kings*, } *ss:*

John Donovon, being first duly sworn, says that he is a resident of the city of New York, borough of Brooklyn, State of New York, and that he is, and for sixteen years last past has been, in the employ of Arbuckle Brothers, at their coffee manufactory in the city

of New York, aforesaid; that during that time deponent's
54 duties in said employment have consisted particularly in applying to the coffee the mixture with which the brand of coffee known as "Ariosa" is coated and glazed; that, further, he is familiar with the process of mixing together the ingredients which form the glazing preparation; that, in the course of said process, the eggs used therein are broken into a galvanized iron receptacle; that they are taken therefrom by another employé who prepares the mixture and placed in a mechanical mixer, which is a revolving drum with revolving beaters inside thereof; that to the eggs there is added a quantity of granulated sugar and water; that after the said ingredients are thoroughly mixed in the aforesaid mechanical mixer, deponent draws off the required quantity and pours some of it into a revolving cylinder, into which he has previously put five hundred and fifty pounds of roasted coffee, which is furnished him in the same room by a supply pipe direct from the bins in which said coffee is stored; that said cylinder is then permitted to revolve, with its contents, for a period of a minute, more or less, mixing the said roasted coffee with the ingredients above described until said coffee is completely covered, coated, sealed and glazed with the same when said deponent discharged it from said cylinder into a discharge pipe to the room below, where the said coffee is dried in bins provided for that purpose.

Deponent further says that during the whole time he has been engaged as aforesaid, in coating and glazing said coffee, he has never seen other ingredients than pure granulated sugar, eggs of good quality, and a small quantity of water, used in preparing the mixture for coating and glazing said coffee, as aforesaid; and that he personally attends to all the said glazing except that attended to by Edwin N. Long.

JOHN DONOVON.

Sworn to before me and subscribed in my presence this 18th day of February, A. D. 1901.

[SEAL.] JAMES J. FORD,
Notary Public, Kings County, N. Y.

And afterwards, to wit, on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures, following, to wit:

55 *Affidavit of James Turner.*

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, and William A. Jamieson, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of James Turner.

STATE OF NEW YORK, *County of New York*, } *ss:*

James Turner, being first duly sworn, makes oath and says that he is a resident of the city of New York, borough of Brooklyn, State of New York, and that he is, and for fifteen years last past has been, in the employ of the firm of Arbuckle Brothers, of the city of New York, manufacturers and vendors of "Ariosa" and confidential representative of such firm, in particular in matters relating to the manufacture and sale of the said "Ariosa."

The said firm of Arbuckle Brothers does now, and for many years has done, a large business in the State of Ohio in the sale of said "Ariosa," said business averaging sales of fourteen million pounds of coffee, more or less, per annum. That said firm employs eleven brokers, or salesmen, in the sale of the said "Ariosa." in said State, and that over ten thousand wholesale and retail dealers in said State are purchasers of the said "Ariosa" for the purpose of reselling the same in the said State.

That on or about the 2nd day of Jan., 1901, deponent was advised that the respondent herein, Joseph E. Blackburn, dairy and food commissioner of the State of Ohio, had issued to the vendors of and dealers in coffee in the State of Ohio, a certain circular, a copy whereof is hereto attached and made a part hereof, and marked "Exhibit A."

That as soon as the said circular was issued, the said firm of Arbuckle Brothers received a large number of inquiries from the agents of said firm in the State of Ohio, and from other persons handling the said "Ariosa" within the said State, as to the meaning and effect of the said circular, and that said inquiries still continue to reach the said firm, and largely increased in number, since the said circular was published, as aforesaid.

56 Deponent immediately after the issuance of the said circular, and on behalf of the said firm of Arbuckle Brothers, requested one John De Witt Warner, counsel for the said firm, to visit the said Blackburn, and inquire as to his purpose in issuing said circular with reference to the said "Ariosa," and to furnish him with any information he might require regarding the quality and

grade of the said coffee and the process used in its manufacture, and to give him all facilities he might desire for personally investigating the grade and the quality of the said coffee and the said process used in its manufacture.

That said Warner thereupon visited said Blackburn, at Columbus, Ohio, and, upon his return, reported to deponent that in the course of his conference with the said Blackburn, said Blackburn, amongst other things, had threatened by prosecution, or otherwise, to stop the sale, in the said State of Ohio, of coffees so treated as to make them appear of greater value than they really were; but that said Blackburn, although he had personally, in the presence of Mr. Warner, examined a package of "Ariosa" coffee, which he, the said Blackburn, had procured, declined and refused, prior to consulting his counsel upon the subject, and making such tests and inquiries as he might thereafter see fit to make, to state whether or not, in his opinion, said "Ariosa" coffee was so treated as to be made to appear better, or of greater value, than it really was, or otherwise so as to make its sale objectionable, or illegal, in the State of Ohio, or a violation of the statute of the State of Ohio, in the petition herein set forth.

That subsequent to said conference, the said inquiries from dealers and vendors of the said coffee in the State of Ohio continued to reach said firm in ever-increasing numbers, and, moreover, numerous notices appeared in the daily papers in the said State, intimating that an attempt would be made by the said commissioner, by prosecution, or otherwise, to restrain the sale of glazed coffees, in particular the said brand of "Ariosa." That, in consequence thereof, deponent, on or about the 18th day of January, 1901, visited said respondent, Joseph E. Blackburn, at his office at Columbus, Ohio, and then and there conferred with him regarding the said threatened prosecutions.

That said Blackburn then advised the deponent that, in his opinion, the said "Ariosa" was not a compound within the meaning of the statute of Ohio, in the petition herein set forth, and that he proposed to make an examination to determine whether the treatment and process of glazing to which said coffee had been subjected before sale was such as to make it appear better than it really
57 was, and that, if, in his opinion, the effect of the glazing employed in said "Ariosa" coffee was to make such coffee appear better than it really was, then said process of glazing was a violation of the statute of Ohio aforesaid, and, unless it was thenceforth omitted from such "Ariosa" coffee as might be offered for sale in Ohio, he, said commissioner, would endeavor, by prosecution under the said statute, to stop the sale of said "Ariosa" in said State, and punish the vendors of and dealers in the said coffee, for the violation of the said statute.

That on or about the first day of February, deponent again called upon the said Blackburn at his office at Columbus, Ohio, aforesaid, and was by him advised that, since the time of the former conference, hereinabove referred to, he had caused to be tested, by washing in water, certain samples of Ariosa coffee, procured for that pur-

pose, and that, after having soaked such coffee for about twenty-five minutes in water, and thereafter having dried it, it was, in his, the said Blackburn's, opinion, in its normal or original condition, and was, in appearance, inferior to the Ariosa coffee glazed and coated according to the process employed by the complainant herein, and so offered for sale in the State of Ohio. That, therefore, in his opinion, the sale of such coffee in the State of Ohio, was illegal and in violation of the said statute of the State of Ohio, in the bill herein set forth, and that, unless such sale of coffee, so glazed and treated by the said process, was promptly discontinued, it would be his duty to, and he would, promptly prosecute all retail, or other dealers, selling or offering for sale, said Ariosa coffee.

Deponent further says that he is familiar with the business of roasting coffee and the various processes of roasting, glazing and preparing for sale, at present in use by the various manufacturers and vendors of packing roasted coffee, and in particular with the characteristics of the coffee used in the manufacture of said Ariosa brand and the processes, by which, and formulæ, according to which said coffee is roasted and treated. That the glazing, by which said coffee is in said process coated is wholly transparent and does not, in any way, disguise or change the original appearance of said coffee, conceal the true grade thereof, or make said coffee appear better than it really is. That, on the contrary, said glazing acts as a varnish, by which the grain of said coffee and its precise quality and features are brought out and made to appear much more plainly, and that, therefore, said glazing does not conceal, but, on the contrary, brings out and more clearly shows, any imperfect berries, whether black or yellow, that may be included in such coffee.

58 Deponent further says that, both from his long experience in the business of coffee-roasting and from repeated and careful experiments under various conditions made by him, since his his last interview with the said respondent, he has ascertained, and therefore deposes, that it is not possible by washing, soaking or any other process that he has been able to discover, or of which he has been informed after coffee has been glazed according to the process used in the preparation of said Ariosa coffee, to remove the glazing and restore said coffee to its original appearance. That, on the contrary, the appearance of Ariosa coffee after having been washed or soaked, as aforesaid largely differs from the original appearance of the coffee used in the manufacture of said brand before it is subjected to complainants' process of sealing, coating and glazing, and in addition thereto, varies greatly, according to the time during which said coffee is thus washed or soaked and the temperature of the water employed in washing or soaking the same. That in said process of soaking, even if continued for a short time only, said coffee rapidly loses its substance and flavor, the water in which the same has been soaked becoming a more or less marked decoction of coffee, and that the coffee thus treated is materially weakened and deprived of its original strength and characteristics.

That roasted coffee, unless it should be so treated as to make it abnormally impervious to water and practically useless for the pur-

poses of the private consumer, would be changed and more or less deteriorated by any process of washing and soaking, such as that resorted to by the said respondent as aforesaid. Deponent further says that on or about the fifth day of February the said Joseph E. Blackburn, respondent herein, further issued to the wholesale dealers in the State of Ohio a certain circular regarding the sale of the said Ariosa brand of coffee in the State of Ohio, a copy whereof is hereto attached and made a part hereof, and marked "Exhibit B."

That the statements in said circular that the firm of Arbuckle Brothers has refused and still refuses to accept the ruling of respondent's department, or to abide by the laws of the State of Ohio, as construed by the supreme court of said State, is wholly untrue and false. That, on the contrary, the said firm of Arbuckle Brothers has always been, and still is willing to comply with the statutes of the State of Ohio, and more particularly with the statute of said State in the bill herein set forth, and has always and still does comply with the said statutes, and that in their business interviews
59 and conferences with the said commissioner, deponent, acting on behalf of the complainants herein and of said firm of Arbuckle Brothers, always expressed to the said commissioner the willingness of the said firm to comply with the said statutes of the State of Ohio, but has, on behalf of said firm, protested against the wrongful and erroneous construction of the said statute by the said respondent, as hereinabove and in complainants' bill herein more particularly set forth.

That on or about the first day of February the Woolson Spice Company, manufacturers and vendors of roasted coffee, of the city of Toledo, Ohio, who, it is by respondent stated in his circular, Exhibit B, above referred to, have agreed to accept respondent's construction of the said statute of Ohio, issued to the dealers in, and vendors of the brand of coffee manufactured and roasted by them, a certain circular, a true copy whereof is hereto attached and made a part hereof, and marked "Exhibit C."

[SEAL.] JAMES TURNER.

Sworn to and subscribed in my presence this 18th day of February, A. D. 1901.

JOHN HALL JONES,
Notary Public in and for New York County, New York.

EXHIBIT A.

Copy of Circular Letter Issued by the Ohio Dairy and Food Commission.

J. E. Blackburn, Ph. G., commissioner.

To whom it may concern:

Notice is hereby given that on and after thirty days from the date hereof, the statute (Bates' R. S., sec. 4200–'6) against the practice of adulterating coffee by manipulation, such as coloring, coating polishing or powdering, whereby damage and inferiority is concealed,

or whereby it is made to appear better and of greater value than it really is, will be strictly enforced.

The following is the law on the subject (Bates' R. S., section 4200–'6, paragraph 6):

(6.) If it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is.

60 The department holds that it is not a compliance with the foregoing to simply label the article "compound" when coffees are filled, coated and glazed to make them appear better or of greater value than they really are, and to retain water that has been added to increase weight.

Additional information will be furnished on request.

Respectfully submitted.

J. E. BLACKBURN,
Dairy and Food Commissioner.

Columbus, Ohio, January 1, 1901.

EXHIBIT B.

STATE OF OHIO:

Office of Dairy and Food Commissioner.

From J. H. Culbertson.

DEAR SIRS: Replying to your inquiry about the coffee situation, would say that this matter is now under consideration and investigation by the chemists of this department. As soon as conclusions are reached, a circular notice will be sent to all the jobbers in Ohio and a sufficient number will be furnished to supply all their salesmen.

I might say that the following firms have agreed to accept the law as construed by this department: Andrus, Scofield & Co., Columbus; Dayton Spice Mills, Dayton; Woolson Spice Co., Toledo.

W. F. McLaughlin & Co., of Chicago, have agreed to comply with the law as soon as construed by the court.

The only firm that has refused, and still refuses, to accept the ruling of this department, or abide by the laws of the State as construed by our supreme court, is Arbuckle Bros., of New York.

Very truly yours,

J. E. BLACKBURN,
Dairy and Food Commissioner.

Columbus, Ohio, February 5, 1901.

EXHIBIT C.

Woolson Spice Co.

Coffees & Spices.

TOLEDO, O., *Feb.* 1*st*, 1901.

To the grocery trade of the State of Ohio.

GENTLEMEN: Some question having been raised as to the
61 application of the Ohio pure-food law to roasted coffees, we beg to assure you that the sale of Lion coffee is not an infringement of that law. Lion coffee is not "colored, coated or polished, whereby damage or inferiority is concealed," nor is it "by any means made to appear better, or of greater value, than it really is." While the law may condemn some other brands of package coffee, it does not apply to Lion coffee.

We will protect all dealers from any loss or damage on account of any alleged violation of the pure-food laws by selling any of our coffees and will defend, at our own expense any suit against any person under the pure-food law, on account of his handling them, if reported to us at once.

Lion coffee is a pure coffee, of uniform, high quality, sold strictly on its merits, and without resort to any practices which violate the law or deceive the consumer.

Yours truly, WOOLSON SPICE COMPANY.

And afterwards, to wit: on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of Annie Plunket.

In the Circuit Court of the United States for the Southern District of Ohio.

JOHN ARBUCKLE ET AL., Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of Annie Plunket.

STATE OF NEW YORK, }
County of Kings, } *ss*:

Mrs. Annie Plunket, being first duly sworn, says that she is a resident of the city of New York, borough of Brooklyn, State of New York, and that she has for fourteen years last past been in the employ of the firm of Arbuckle Brothers in the city and State
62 aforesaid; that her duties in said employment are, and for six years last past have been, to assist in the process of glaz-

ing and coating the "Ariosa" brand of coffee manufactured by the said firm at their manufactory in the city of New York aforesaid, by receiving and breaking the eggs used in preparing the mixture of eggs and sugar employed in the said process of glazing aforesaid; that she personally breaks all of the eggs so used, except those broken by Maggie Butler, Addie Ehlers and Alice Buckon.

That in the course of her said duties, the said eggs are delivered to deponent in large boxes; that deponent, after inspecting said eggs, breaks them and throws the sound contents thereof into a galvanized-iron receptacle, provided for the purpose, which said receptacle is cleaned and polished daily; that after said deponent has so broken said eggs into said receptacle, the contents thereof are taken therefrom by another employé of the said firm, who adds thereto a portion of granulated sugar and a small quantity of water, mixing all of the said ingredients together by means of a mechanical mixer; another employé then feeds said mixer into a cylinder, into which the roasted coffee, used in the preparation of said brand, has theretofore been placed; that during the whole of the time the deponent has been so employed in the manufacture of said "Ariosa" coffee, the eggs received and used by her have been of good quality and absolutely sound, and that no other ingredients excepting such eggs, sugar and a small quantity of water have been, during said time used in the coating and sealing or glazing of the said coffee.

MRS. ANNIE PLUNKET.

Sworn to before me and subscribed in my presence, this 19th day of February, A. D. 1901.

[SEAL.]

JAMES J. FROST,
Notary Public, Kings County, N. Y.

63 And afterwards, to wit: on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of Edward Long.

In the Circuit Court of the United States for the Southern District of Ohio.

JOHN ARBUCKLE ET AL., Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of Edward N. Long.

STATE OF NEW YORK, *County of Kings*, } *ss.*:

Edwin N. Long, being first duly sworn, says that he is a resident of the city of New York, borough of Brooklyn, State of New York, and that he is, and for four years last past has been, in the employ

of Arbuckle Brothers at their coffee manufactory in the city of New York aforesaid; that during that time deponent's duties in said employment have consisted particularly in applying to the coffee the mixture with which the brand of coffee known as "Ariosa" is coated and glazed; that, further, he is familiar with the process of mixing together the ingredients which form the glazing preparation; that in the course of said process, the eggs used therein are broken into a galvanized-iron receptacle; that they are taken therefrom by another employé who prepares the mixture and places in a mechanical mixer, which is a revolving drum with revolving beaters inside thereof; that to the eggs there is added a quantity of granulated sugar and water; that after the said ingredients are thoroughly mixed in the aforesaid mechanical mixer, deponent draws off the required quantity and pours some of it into a revolving cylinder, into which he has previously put five hundred and fifty pounds of roasted coffee which is furnished him in the same room by a supply pipe direct from the bins in which said coffee is stored; that said cylinder is then permitted to revolve, with its contents, for a period of a minute, more or less, mixing the said roasted coffee with
64 the ingredients above described, until said coffee is completely covered, coated, sealed and glazed with the same, when said deponent discharges it from said cylinder into a discharge pipe to the room below, where the said coffee is dried in bins provided for that purpose.

Deponent further says that during the whole time he has been engaged as aforesaid, in coating and glazing said coffee he has never seen other ingredients than pure granulated sugar, eggs of good quality and a small quantity of water used in preparing the mixture for coating and glazing said coffee, as aforesaid; and that he personally attends to all the said glazing, except that attended to by John Donovon.

EDWIN N. LONG.

Sworn to before me and subscribed in my presence this 18th day of February, A. D. 1901.

[SEAL.] JAMES J. FROST,
Notary Public, Kings County, New York.

And afterwards, to wit: on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of Patrick Clancy.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, and William A. Jamison, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of Patrick Clancy.

STATE OF NEW YORK, *County of Kings,* } ss:

Patrick Clancy, being first duly sworn, says that he is a resident of the city of —— borough of Brooklyn, State of New York, and
65 is, and for twelve years last past has been, in the employ of the firm of Arbuckle Brothers in said city and State. That deponent now is, and for ten years last past has been by said firm employed in the drying-room in their said factory in the city of New York aforesaid, where the brand of coffee named Ariosa is prepared.

That said coffee is received in the said drying-room through certain feed-pipes from the room above where another employé of the said firm is employed to, and does, attend to the coating and glazing of the same, as in the bill more particularly set forth.

Said coffee, after coming down said feed-pipes, is distributed into a number of bins in said room, said bins having a perforated bottom, through which hot air is forced in order to dry said coffee. That besides deponent, there are five other employés employed at the same work in said drying-room.

That deponent and his fellow-employés in said room constantly examine the coffee in the bins, in which it has been placed, and, as soon as said coffee is found to be dry, shovel it out into a discharge pipe, which carries it by gravity to the store bins, whence it is taken by other employés of the said firm, and packed in one-pound packages ready for shipment and sale.

That so long as deponent has been in the employ of the said firm, as aforesaid, the coffee handled by him has been of good quality and grade.

PATRICK CLANCY.

Sworn to before me and in my presence subscribed, this 19th day of February, A. D. 1901.

[SEAL.] JAMES J. FROST,
Notary Public in and for Kings County, New York.

66 And afterwards, to wit: on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of Philip Schrantz.

In the Circuit Court of the United States for the Southern District of Ohio.

JOHN ARBUCKLE ET AL., Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of Philip Schrantz.

STATE OF NEW YORK, *County of Kings*, } *ss:*

Philip Schrantz, being first duly sworn, says that he is a resident of the city of New York, borough of Brooklyn, State of New York, and is, and for five years last past has been, in the employ of the firm of Arbuckle Brothers at their coffee manufactory in the city of New York aforesaid; that deponent's duties in said employment are and for five years last past have been to mix the preparation used for coating and glazing the brand of coffee known as Ariosa coffee, more particularly described in complainants' bill filed herein; that said preparation, or mixture, is composed solely of granulated sugar and eggs, slightly diluted with pure water; that, in the course of said process, the eggs used therein are by deponent taken from the galvanized-iron receptacle, into which they have been broken by other employés of the said firm, and placed in a mechanical mixer; that deponent then adds to them a quantity of granulated sugar, from sugar in barrels, supplied to him for that purpose, and a small quantity of water, from the regular supply of water used in said borough of Brooklyn for drinking and other purposes; that, after mixing the said ingredients as aforesaid, another employé pours said mixture into a certain revolving cylinder, into which he has previously put five hundred fifty pounds of roasted coffee, which is furnished him in the same room by a supply pipe directed from the bins in which said coffee is stored; that said cylinder is
67 then permitted to revolve with its contents for a period of a minute, more or less, mixing the said roasted coffee with the ingredients above described, until said coffee is completed covered, coated, sealed and glazed with the same, when said employé discharges it from said cylinder by a discharge pipe into a room below, where said coffee is dried in bins, provided for that purpose.

That during the whole time deponent has been engaged in mixing the glazing ingredients aforesaid and familiar with the process of coating and glazing said coffee, as aforesaid, no ingredients, other than pure granulated sugar, eggs of good quality and a small quantity of water, have been used in preparing the mixture for coating and glazing said coffee, as aforesaid; and that deponent mixes all the said glazing mixture so used, except that mixed by John Kinsella.

PHILIP SCHRANTZ.

Sworn to before me and subscribed in my presence, this 18 day of February, A. D. 1901.

[SEAL.] JAMES J. FROST,
Notary Public in and for Kings County, N. Y.

And afterwards, to wit: on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of Alice Buckon.

In the Circuit Court of the United States for the Southern District of Ohio.

JOHN ARBUCKLE ET AL., Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of Alice Buckow.

STATE OF NEW YORK, }
County of Kings, } *ss:*

Alice Buckow, being first duly sworn, says that she is a
68 resident of the city of New York, borough of Brooklyn, State of New York, and that she has for ten years last past been in the employ of the firm of Arbuckle Brothers, in the city of and State aforesaid; that her duties in said employment are, and for three years last past have been, to assist in the process of glazing and coating the "Ariosa" brand of coffee manufactured by the said firm at their manufactory in the city of New York aforesaid, by receiving and breaking the eggs used in the preparing the mixture of eggs and sugar employed in the said process of glazing aforesaid; that she personally breaks all of the eggs so used, except those broken by Maggie Butler, Annie Plunket and Addie Ehlers.

That in the course of her said duties, the said eggs are delivered to deponent in large boxes, that deponent after inspecting said eggs, breaks them and throws the sound contents thereof into a galvanized-iron receptacle provided for the purpose, which said receptacle is cleaned and polished daily; that after said deponent has so broken said eggs into said receptacle the contents thereof are taken therefrom by another employé of the said firm, who adds thereto a portion of granulated sugar and a small quantity of water, mixing all of the said ingredients together by means of a mechanical mixer; another employé then feeds said mixer into a cylinder, into which the roasted coffee, used in the preparation of said brand, has theretofore been placed; that during the whole of the time the deponent has been so employed in the manufacture of said "Ariosa" coffee, the eggs received and used by her have been of good quality and absolutely sound, and that no other ingredients, excepting such

eggs, sugar and a small quantity of water, have been during said time used in the coating and sealing, or glazing of the said coffee.

ALICE BUCKOW.

Sworn to before me and subscribed in my presence, this 19th day of February, A. D. 1901.

[SEAL.] JAMES J. FROST,
Notary Public in and for Kings County, N. Y.

And afterwards, to wit: on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

69 *Affidavit of Maggie Butler.*

In the Circuit Court of the United States for the Southern District of Ohio.

JOHN ARBUCKLE ET AL., Complainant-,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of Maggie Butler.

STATE OF NEW YORK, *County of Kings*, } *ss:*

Maggie Butler, being first duly sworn, says that she is resident of the city of New York, borough of Manhattan, State of New York, and that she has for seventeen years last past been in the employ of the firm of Arbuckle Brothers, in the city of and State aforesaid; that her duties in said employment are, and for seventeen years last past have been, to assist in the process of glazing and coating the "Ariosa" brand of coffee manufactured by the said firm at their manufactory in the city of New York aforesaid, by receiving and breaking the eggs used in preparing the mixture of eggs and sugar employed in the said process of glazing aforesaid; that she personally breaks all of the eggs so used, except those broken by Annie Plunket, Addie Ehlers and Alice Buckon.

That in the course of her said duties, the said eggs are delivered to deponent in large boxes, that deponent after inspecting said eggs, breaks them and throws the sound contents thereof into a galvanized-iron receptacle, provided for the purpose, which said receptacle is cleaned and polished daily; that after said deponent has so broken said eggs into said receptacle, the contents thereof are taken therefrom by another employé of the said firm, who adds thereto a portion of granulated sugar and a small quantity of water, mixing all of the said ingredients together, by means of a mechanical mixer; another employé then feeds said mixer into a cylinder, into which the roasted coffee, used in the preparation of said brand, has therefore been placed; that during the whole of the time the deponent

has been so employed in the manufacture of said "Ariosa" coffee the eggs received and used by her have been of good quality and
70 absolutely sound, and that no other ingredients, excepting such eggs, sugar and a small quantity of water, have been, during said time, used in the coating and sealing, or glazing of the said coffee.

MAGGIE BUTLER.

Sworn to before me and subscribed in my presence, this 19th day of February, A. D. 1901.

[SEAL.] JAMES J. FROST,
Notary Public in and for Kings County, N. Y.

And afterwards, to wit, on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of Addie Ehlers.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, and William A. Jamieson, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of Addie Ehlers.

STATE OF NEW YORK, *County of Kings,* } *ss:*

Addie Ehlers, being first duly sworn, says that she is a resident of the city of New York, borough of Brooklyn, State of New York, and that she has for seventeen years last past been in the employ of the firm of Arbuckle Brothers, in the city and State aforesaid; that her duties in said employment, are, and for seventeen years last past have been to assist in the process of glazing and coating the "Ariosa" brand of coffee, manufactured by the said firm at their manufactory in the city of New York aforesaid by receiving and breaking the eggs used in preparing the mixture of eggs and sugar employed in the said process of glazing aforesaid; that she personally breaks all of the eggs so used, except those broken by Maggie Butler, Annie Plunkett and Alice Buckon.

71 That in the course of her said duties, the said eggs are delivered to deponent in large boxes; that deponent, after inspecting said eggs, breaks them and throws the sound contents thereof into a galvanized-iron receptacle, provided for the purpose, which said receptacle is cleaned and polished daily; that, after said deponent has so broken said eggs into said receptacle, the contents thereof are taken therefrom by another employé of the said firm,

who adds thereto a portion of granulated sugar and a small quantity of water, mixing all of the said ingredients together by means of a mechanical mixer, another employé then feeds said mixture into a cylinder, into which the roasted coffee used in the preparation of said brand has theretofore been placed, that during the whole of the time the deponent has been so employed in the manufacture of said "Ariosa" coffee, the eggs received and used by her have been of good quality and absolutely sound, and that no other ingredients, excepting such eggs, sugar and a small quantity of water, have been during said time used in the coating and sealing, or glazing of the said coffee.

ADDIE EHELERS.

Sworn to before me and subscribed in my presence this 19th day of February, A. D. 1901.

[SEAL.] JAMES J. FROST,
Notary Public, Kings County, New York.

And afterwards, to wit, on the 26th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of Edward F. Schnuck.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, and William A. Jamieson, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of Edward F. Schnuck.

STATE OF NEW YORK, *County of Kings,* } *ss:*

Edward F. Schnuck, being duly sworn, says: I reside in
72 the borough of Brooklyn, city of New York, for more than ten years prior to October, 1897, I was in the employ of Jabes Burns & Sons, the largest manufacturers and installers of coffee-roasting machinery; for about nine years of which time I was their superintendent of construction and, as such, personally had charge of erecting coffee-roasting plants in many of the cities of the United States, and thus became familiar with all of the methods of cleaning, treating and roasting coffee, and the machinery and other means employed therefor.

Since October, 1897, I have been general superintendent for Arbuckle Brothers, at their roasting plant in the borough of Brooklyn, city of New York, at which plant they roast and pack "Ariosa" coffee. Under Mr. Arbuckle and Mr. Jamison, I there have super-

vision and complete direction of all details pertaining to machinery, manufacturing processes, and treatment of coffee. This plant is completely equipped with the most modern and practical automatic mechanical devices for cleaning coffee of dirt, removing therefrom the chaff, sticks, stones and such other trash as is found in coffee before mechanical treatment. In this plant the preparation, roasting and treatment of coffee for the "Ariosa" brand, is substantially as follows:

The green or raw coffee is dumped from the original bags into a cup-belt elevator, which carries the coffee to the eighth, or top, story of the building, where it is dumped into a large receiving hopper, from an outlet in the bottom of which it flows over a series of shaking sieves, from whence it falls into a large pipe, where it is subjected to a strong blast of air produced by powerful fans. In these processes there is nothing added to the coffee but the latter is cleaned to as complete a degree as is possible. The processes are all automatic, and the coffee is conducted from one to another automatically and without handling.

From the cleaning apparatus the coffee is taken up by carrier belts and distributed through a series of hoppers feeding individual roasting cylinders, which revolve over a grate fire of anthracite coal. Great care is exercised in the roasting, to bring the coffee gradually up to uniform, perfect roast, each attendant being held to a strict personal ac-ountability for the condition of the roasted coffee turned out by him.

From the roasting cylinders the coffee falls by gravity and spreads over shallow, double-bottom boxes placed at oblique angles, the upper bottom being perforated. The space between the two bottoms is provided with a strong suction produced by powerful ex-
73 haust fans. The effect of this suction is to draw the hot air from the body of the coffee and the cooler air of the room through the coffee, so that the latter is quickly cooled and danger of blackening, charring and firing the coffee thereby removed.

In the process of roasting, chaff and hulls have separated from the berries and dust, broken particles and other imperfections have been created, which require for their elimination a repetition of mechanical treatment practically identical with that to which the green coffee was subjected prior to roasting. The roasted coffee is automatically conducted through these processes until it arrives in storage receptacles ready for the glazing process. Up to this point nothing has been added to the coffee, but it is now roasted and thoroughly cleaned.

The glazing preparation and process is as follows: The eggs are, first, each one candled by experienced candelers, in our own candling-rooms—part of the plant and under my direction—and nothing but an absolutely sound egg is selected for glazing material. The eggs which have withstood the candling test are then brought into the glazing-room where also are located the storage receptacles holding the roasted coffee, ready for glazing. The names of the women who handle and break the eggs in the glazing-room are Maggie Butler, Annie Plunket, Addie Ehlers and Alice Buckou, two of them

working together day turn, and two of them working together night turn, when the factory is running both day and night, and one pair alternating with the other pair when the factory is only running day turn. These women break the eggs, throwing the contents into a large galvanized-iron receptacle, which is daily cleansed and scoured. From this receptacle the eggs are taken by the mixers, who add to them the amount of sugar required by the formula. The eggs and sugar are then diluted with a small amount of water, and the mixture is made th-rough and complete by means of a mechanical mixer. The names of the mixers are John Kinsella and Philip Schrank, one working day turn and one working night turn, or one alternating with the other when the factory is only running day turn.

The coffee receptacles above mentioned are connected with large revolving drums by means of gravity-discharge pipes. The glazers operate the valves in these pipes, filling the drums with the required charges at one end, and through the other pouring the amount of glazing material prepared by the mixers as called for by the formula. In these revolving drums, the surface of the coffee berries becomes thoroughly coated with the glazing preparation, the time required being only from one to two minutes. The
74 names of the glazers are John Donovan and Edwin W. Long, one working night turn and the other working day turn or one alternating with the other when the factory is only run on a day turn.

When the coffee is properly glazed, as above described, the glazers operate the discharge valves of the drums and the coffee falls, by gravity, into long, narrow boxes having double bottoms, the upper bottom being perforated. The coffee, as it falls, is spread throughout the length of these boxes, by attendants using shovels. Connected with the space between the two bottoms of the boxes are pipes, through which powerful blower fans pump hot air. This air, rising through the coffee, quickly dries the glazing coat and leaves it firmly attached and hard upon the surface of the berries. The coffee, when thus thoroughly glazed and dried, is then shoveled through discharge pipes, through which it falls upon carrier belts and is distributed through a series of hopper receptacles. The names of the men who work upon the drying floor and who handle the coffee during the drying process are John Ross, George Davis, John Hawn, Frank Becker, James McMillian, Charles Brice, Edward Zeidler, Gus Fickett, Henry Dubois, Pat Clancy, Mike McGrahan, and Simon Smith, said Ross, with five others, and said Davis, with five others, alternating on day turn, or one-half working night turn and one-half day turn when the factory is running both day and night.

As I say above, the glazed and dried coffee is conducted by carrier belts into hopper receptacles. These hopper receptacles are located directly over automatic packing machines, through which the coffee flows automatically, and is weighed and packed, also automatically, into one-pound packages bearing the label familiar to the public as enclosing "Arbuckle's Ariosa coffee."

In all the operations and processes above described, and in all my experience with Arbuckle Brothers, I have never seen any coffee used that was not absolutely sound the treatment of the coffee has been solely in the direction of cleaning same prior to roasting and thereafter with the exception of the glazing I have never seen anything added to the coffee except the glazing material, and my position and supervision is such that I would know the contrary were such the case. The glazing material consists solely of sound eggs and granulated sugar, mingled together by the aid of a small quantity of water. The coffee is thoroughly roasted and dry before the glazing is attached, and it is likewise thoroughly dried after the glazing process.

EDWARD F. SCHNUCK.

75 Sworn to before me and in my presence subscribed, this 18th day of February, A. D. 1901.

[SEAL.] JAMES J. FROST,
Notary Public in and for Kings County, New York.

And afterwards, to wit, on the 26th day of March, A. D. 1901, the following letters patent was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Letters Patent.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR, PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted John Arbuckle, Jr., January 21, 1868, number 73,486, for improvement in roasted coffee.

In testimony whereof, I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the city of Washington, this 15th day of February, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America, the one hundred and twenty-fifth.

[SEAL.] C. H. DUELL,
Commissioner of Patents.

10c. int. rev. stamp. Feb. 15, 1901.

No. 73,486.

The United States of America to all to whom these letters patent shall come:

Whereas, John Arbuckle, Jr., Allegheny city, Pennsylvania, has alleged that he has invented a new and useful improvement in roasted coffee, and has made oath that he is a citizen of the United States, that he verily believes he is the original and first inventor or discoverer of the said improvement, and that the same hath
76 not, to his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the

sum of thirty-five dollars, and presented a petition to the Commissioner of Patents praying that a patent may be issued therefor.

These are, therefore, to grant to the said John Arbuckle, Jr., his executors, administrators or assigns, for the term of seventeen years from the twenty-first day of January, one thousand eight hundred and sixty-eight, the full and exclusive right and liberty of making, using and vending to others to be used, the said improvement, a description whereof is given in the annexed schedule, and made a part of these presents.

In testimony whereof, I have caused these letters to be made patent, and the seal of the Patent Office to be hereunto affixed.

Given under my hand at the city of Washington, this twenty-first day of January, in the year of our Lord one thousand eight hundred and sixty-eight and of the Independence of the United States of America, the ninety-second.

[SEAL.]

W. F. OTTO,
Acting Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

A. M. STOUT,
Acting Commissioner of Patents.

United States Patent Office.

JOHN ARBUCKLE, JR., of Allegheny City, Pennsylvania.

Letters Patent No. 73,486, dated January 21, 1868.

Improvement in Roasted Coffee.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, John Arbuckle, Jr., of the city and county of Allegheny, in the State of Pennsylvania, have invented a new and useful improvement in "roasted coffee" and I do hereby declare that the following is a full and exact description thereof.

The nature of my invention consists of roasting coffee and
77 then coating it with a glutinous or gelatinous matter, for the purpose of retaining the aroma of the coffee, and also act as a clarifying agent when the ground coffee has been boiled in water.

To enable others skilled in the art of "roasting coffee" to use my invention, I will proceed to describe its operation or preparation.

I take any good article of green coffee and roast it by any of the known means. I then cool it as quickly as possible. I then prepare a mixture of the following ingredients, in about the following proportions: One ounce of Irish moss; half an ounce of isinglass; half an ounce of gelatine; one ounce of white sugar and twenty-four eggs. I boil the Irish moss in a quart of water, and then strain it. I then boil the isinglass and gelatine in a pint of water. I then mix

the sugar and eggs well together and when the mixture of Irish moss, isinglass, gelatine and water has become cold, I mix the whole of the ingredients into one homogeneous compound. I then pour the whole over about one hundred pounds of the roasted coffee, and stir and so manipulate the coffee that each grain will be entirely coated, after the coffee is coated and the coating has become dry and hard, which is accomplished by forcing currents of air through it while stirring it, for the purpose of coating it with the glutinous or gelatinous matter described.

I wish it clearly understood that I do not confine myself to the above compound of glutinous matter for coating roasted coffee, for many other compounds may be formed which will accomplish the end desired, to wit, coating roasted coffee in the manner and for the purpose set forth.

What I claim is:

Coating roasted coffee with any glutinous or gelatinous matter, for the purpose of retaining the aroma of the coffee, and also act as a clarifying agent as herein described and set forth.

JOHN ARBUCKLE, JR.

Witnesses:
JAMES J. JOHNSTON.
A. C. JOHNSTON.

And afterwards, to wit, on the 27th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

78 *Affidavit of John H. Culbertson.*

In the Circuit Court of the United States for the Southern District of Ohio.

JOHN ARBUCKLE ET AL., Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Affidavit of John H. Culbertson.

STATE OF NEW YORK, *Franklin County,* } ss:

John H. Culbertson, of lawful age, being first duly sworn, says that he resides in the city of Columbus, Franklin county, Ohio, and has done so since the year 1876; that he is a merchandise broker by occupation, and was formerly a member and the president of the city council of the city of Columbus, Ohio; that affiant is personally acquainted with the defendant, Joseph E. Blackburn; that affiant has examined the records of deeds and mortgages and the tax duplicate of said county at the court-house thereof, and finds that the said defendant has no property standing in his name as shown by said records; that affiant and his family now reside, and for some time

last past have resided, in said city of Columbus; that the title to the house and lot whereon the defendant and his family reside stands in the name of the defendant's wife, is of the taxable value of thirty-one hundred and fifty dollars, is of the approximate value of not to exceed sixty-five hundred dollars, and is subject to an existing uncanceled mortgage thereon of four thousand dollars; that the purchase price of said house and lot paid or to be paid by said defendant's wife is the sum of fifty-five hundred dollars; and that affiant is informed and believes that the defendant has not sufficient property to respond in damages, if called upon to do so, in the sum claimed in the amendment to the bill herein, to wit, the sum of one hundred thousand dollars, or anything near that sum, if he is able to respond in any sum whatever.

And further affiant saith not.

JOHN H. CULBERTSON.

Sworn to before me and subscribed in my presence, by the said John Culbertson, this 26th day of March, 1901.

WILLIAM G. BROSSMAN,
[SEAL.] *Notary Public, Franklin County, Ohio.*

79 And afterwards, to wit: on the 27th day of March, A. D. 1901, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of Alvin E. Zollinger.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, James N. Jarvie, and William A. Jamison, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.
} In Equity. No. 985.

Affidavit of Alvin E. Zollinger.

STATE OF OHIO, *Franklin County,* } ss:

Alvin E. Zollinger, of lawful age, being duly sworn, says: that he resides now, and has resided all his life in the city of Columbus, Franklin county, Ohio; that he is now and has been employed by one of the newspapers of said city of Columbus as a reporter and as agent to secure circulation and advertisements for the paper with which he is connected; that in course of his business he became personally acquainted with the defendant, Joseph E. Blackburn, with whom he has been personally acquainted for more than six months last past; that the defendant, Blackburn, some time in the

month of October, 1900, while the defendant was then a candidate for re-election to a third term as dairy and food commissioner of the State of Ohio, personally stated to affiant, in substance that he, said Blackburn was not then worth a dollar in the world; that he said Blackburn had theretofore invested his savings of former years in lead mining in the vicinity of Joplin, in the State of Missouri, and that said savings had been wholly lost; that affiant is informed and believes that the defendant Blackburn has not sufficient property, if he has any property, to respond to any judgment in damages in the sum mentioned in the amendment to the bill in this action, namely in the sum of $100,000, or in any amount approximating that
80 sum, if he would be able to respond to any judgment in damages.

And further affiant saith not.

ALVIN E. ZOLLINGER.

Sworn to before me and subscribed in my presence, this 26th day of March, A. D. 1901.

[SEAL.] WILLIAM G. BROSSMAN,
Notary Public, Franklin Co., O.

And afterwards, to wit: on the 27th day of March, A. D. 1901, the following opinion of Judge Thompson was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Opinion of Judge Thompson.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE ET AL.
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Application for a temporary injunction.

The complainants, in their bill, alleged in substance, that they manufacture and sell a preparation of coffee, known as Ariosa, which "is a mixture of compound of roasted coffee, eggs and sugar—each a common, healthy and unobjectionable article of food;" that they have manufactured and sold it for more than thirty years; that it has gained great repute and sale and is generally used in Ohio and throughout the United States; that the good will of the business of its manufacture and sale has become very valuable; that it is sold in Ohio in one-pound packages which, in compliance with the laws of Ohio, providing against the adulteration of food, is distinctly labeled with a printed statement of its precise composition and the proportion of each of its ingredients; but that notwithstanding these facts the respondent, as dairy and food commissioner of

Ohio, has notified complainants that he considers Ariosa, as
81 put up by them, an adulteration, and has issued a circular letter to dealers and vendors wrongfully charging that complainants in the manufacture and sale thereof, refuse to abide by the laws of Ohio, providing against the adulteration of food, and proposes to institute prosecutions to prevent and punish its sale or offer for sale in Ohio; that if the respondent "be permitted to commit the threatened wrongs the same will, as complainants are informed and believe, damage complainants to the extent of more than $100,000 an amount largely in excess of respondent's ability to respond in judgment;" and that the statute of Ohio providing against the adulteration of food "construed as respondent claims it should be, is in conflict with the fourteenth amendment to the Constitution of the United States and void."

And they pray that the respondent be perpetually enjoined.

"1. From stating or charging that complainants' said food product, Ariosa, being a compound of pure roasted coffee, mixed, treated, coated and glazed with a preparation of sugar and eggs, according to the formula and by the process hereinbefore set forth, is an article of food adulteration within the meaning of said statute, and that the use of complainants' said process of coating and glazing the coffee, constituting the chief ingredient of Ariosa, with a preparation of sugar and eggs, as hereinbefore more particularly described, constitutes a violation of said statute, and that the importation of said Ariosa into Ohio, or the selling of, or offering for sale, the same constitutes a violation of said statutes;

2. From charging the complainants herein, or any of them, or said firm of Arbuckle Brothers, or any dealer in Ariosa, with violating said statute by selling, or offering for sale, Ariosa, or with adulterating food, in violation of said statute, by reason of the aforesaid treatment and coating of the coffee forming an ingredient of Ariosa with a preparation aforesaid.

3. From charging the complainants, or any of them, or said firm of Arbuckle Brothers with violating the said statute by adopting and using said process of coating above described, or by selling, or offering for sale Ariosa so glazed.

4. From charging any dealer in Ariosa with the possession, offering for sale, or sale of, an adulterated food product, within the meaning of said statute, in having in their possession, offering for sale, or selling Ariosa so glazed.

82 5. From menacing and threatening any dealer in Ariosa, so glazed, with prosecution for having in his possession, offering for sale, or selling such Ariosa.

6. From instituting, or commencing against any person, partnership or corporation, having in his, their or its possession, offering for sale, or selling, Ariosa, any action, suit, proceeding or prosecution, based upon the treatment and coating of the coffee forming an ingredient of said Ariosa with a preparation of sugar and eggs, according to the formula and by the process, more particularly above described."

The respondent resists the application upon the ground that the

bill does not state facts sufficient to entitle the complainants to the relief prayed for.

It is not alleged that the Ohio statute providing against the adulteration of food is in conflict with the fourteenth amendment to the Constitution of the United States, but the suggestion is that if construed as the respondent claims it should be, it will be in conflict with that amendment. The statute is not directed against the manufacturer and sale of Ariosa, but against the coating of any article of food which conceals damage or inferiority or makes it appear better or of greater value than it really is. The law of Pennsylvania under discussion in the Schollenberger case (171 U. S. 1) prohibited the manufacture or sale of oleomargarine without reference to whether it was pure or impure. The court is of the opinion, therefore, that the enactment of the statute was a legitimate exercise of the police power of the State, and that it contravenes no provision of the Constitution of the United States or the constitution of Ohio, and, therefore, the questions arising out of the conduct of a State officer, in attempting to enforce a State law, in conflict with a Constitution of the United States, *is* eliminated from the case. We have then, simply the question whether the threatened enforcement of this statute against the complainants by the respondent, in accordance with his construction of it, justifies the relief prayed for.

Ariosa is not excepted from the operation of the statute by the proviso of clause 7 of paragraph *b* of section 3 thereof (sec. 4200–'6 Rev. Stat. of Ohio) because it is not a mixture or compound. The coffee, sugar and eggs are not intermixed or united so as to form a new or distinct substance, but the sugar and the eggs, are intermixed and united forming a glaze which is applied to the coffee berry as a coating. Ariosa is not a compound of coffee, sugar and eggs, but is coffee coated with a glaze made of sugar and eggs,
83 and if it is so coated as to conceal "damage or inferiority," or, if by means of the coating "it is made to appear better or of greater value than it really is," it is adulterated within the meaning of the statute, and the manufacture, sale thereof, or offer to sell the same, is made a misdemeanor by the laws of Ohio, punishable by fine or imprisonment. The respondent claims that the coating conceals damage to, or inferiority in the coffee berry and makes it appear better and of greater value than it really is. The complainants deny this and insist that the coffee is sound and of superior drinking quality, and that it is not made to appear better or of greater value than it really is.

Now, the court is asked to hear evidence and determine this issue, and if it is found in favor of the complainants, to enjoin the dairy and food commissioner of Ohio from prosecuting any one who may manufacture, sell or offer to sell Ariosa in Ohio, but if the issue is found in favor of the respondent, no relief can be afforded him as against the complainants and the dealers in Ariosa, but he will be remitted to the Ohio courts to retry the same issue before the juries of those courts in every prosecution he may institute against offenders. The court is not asked to protect the property of the complainants against criminal aggressions of the respondent where

the court might be called on to consider whether its intervention was justified or whether it should remit the complainants to a prosecution for the criminal offense, and therefore not within the rulings in the case of *In re* Debs, 158 U. S. 589, and kindred cases, where, notwithstanding the aggressions complained of were criminal offenses, the court, nevertheless, intervened to prevent irreparable injury, which could not be redressed at law, but it is a case where the court is asked to restrain and prevent criminal prosecutions until it can first determine whether they should be instituted or not. There is no precedent to justify such action. The precedents have been carefully collected and digested by Judge Rufus Smith of the superior court of Cincinnati, in an able opinion delivered in the case of the Pre-Digested Food Company *vs.* Frederick B. McNeal, 1 Ohio Nisi Prius Reports, 266, and none will be found supporting the claim made by the complainants.

The bill will, therefore, be dismissed.

And afterwards, to wit: on the 30th day of March, A. D. 1901, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

84 Journal, —.

This cause came on to be heard upon the application of the complainants for a preliminary injunction to restrain and enjoin the respondent, as prayed in the bill of complaint and the amendment thereto, and was submitted to the court upon the pleadings and the evidence and the arguments of counsel, and the court, being now fully advised in the premises, finds for the respondent.

It is, therefore, ordered, adjudged and decreed that complainants' application for a preliminary injunction be denied, and such preliminary injunction be and the same hereby is refused.

It is further ordered, adjudged and decreed that complainants' application for a preliminary injunction be denied, and such preliminary injunction be and the same hereby is refused.

It is further ordered, adjudged and decreed that the said complainants' bill of complaint and the amendment thereto be dismissed, that the defendant go hence without day and that he recover his costs herein.

Thereupon came the complainants in open court and prayed an appeal from the order of said court denying the application for a preliminary injunction and refusing such preliminary injunction, and also likewise prayed an appeal from said order and decree dismissing complainants' bill of complaint and the amendment thereto, and from said judgment in favor of said defendant, to the circuit court of appeals for the sixth circuit, which said appeals are severally allowed upon complainants giving bond with surety to the approval of the clerk of this court in the sum of five hundred dollars.

And afterwards, to wit: on the 1st day of April, A. D. 1901, the following appearance was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appearance missing.

And afterwards, to wit: on the 2nd day of April, A. D. 1901, the following petition on appeal was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

85 *Petition on Appeal.*

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, and William A. Jamison, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Petition on appeal.

The above-named complainants, conceiving themselved aggrieved by the order and decree made and entered on the 27th day of March, 1901, in the above-entitled cause, do hereby appeal from said order and decree to the United States circuit court of appeals for the sixth circuit, for the reasons specified in the assignment of errors that is filed herewith, and pray that this appeal may be allowed and that a transcript of the record, proceedings and papers, upon which said order and decree were made, duly authenticated, may be sent to the said United States circuit court of appeals for the sixth circuit.

PECKHAM, WARNER & STRONG,
BROWN & GEDDES,
Solicitors for Complainants.

Dated 30th day of March, 1901.

The foregoing claim of appeal is allowed.

——— ———,
District Judge.

Dated — day of April, 1901.

And afterwards, to wit, on the 2nd day of April, A. D. 1901, the following assignment of errors was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

86 *Assignment of Errors.*

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, & William A. Jamison, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Assignment of errors.

And now on the first day of April, 1901, come the said complainants, by Peckham, Warner & Strong and Brown & Geddes, their solicitors, and say that the order and decree, made and entered in said suit on the 27th day of March, 1901, are erroneous and against the just rights of the said complainants for the following reasons:

First. Because the court erred in finding that Ariosa is not a mixture or compound.

Second. Because the court erred in finding that Ariosa is not a mixture or compound, and therefore not excepted from the operation of the statute of the State of Ohio, in complainants' bill set forth (sec. 4200–'6, R. S. of O.) by the proviso of clause 7 of paragraph B, of section 3 thereof.

Third. Because the court erred in finding that Ariosa is not a compound of coffee, sugar and eggs, but is coffee coated with a glaze made of sugar and eggs.

Fourth. Because the court erred in finding that, if Ariosa, by the use of complainants' process in their said bill herein described, the coffee, a constituent of Ariosa, becomes so coated as to conceal "damage or inferiority," or if, by reason of the said process, said coffee "is made to appear better, or of greater value, than it really is," Ariosa is adulterated within the meaning of the statute, and the manufacture or sale thereof, or offer to sell the same, is made a misdemeanor by the laws of Ohio, punishable by fine or imprisonment.

Fifth. Because the court erred in refusing the restraining order prayed for by these complainants.

Sixth. Because the court erred in refusing the preliminary injunction prayed for by these complainants.

Seventh. Because the court erred in dismissing complainants' said bill of complaint herein.

87 Eighth. Because the court erred in finding for the respondent herein and dismissing the complainants' said bill, when

the court should have found for the complainants herein, and should have granted the preliminary injunction by them prayed for.

BROWN & GEDDES,
PECKHAM, WARNER & STRONG,
Solicitors for Complainants.

And afterwards, to wit, on the 2nd day of April, A. D. 1901, the following appeal bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appeal Bond.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, & William A. Jamison, Complainants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent.

Bond on appeal.

Know all men by these presents, that we, John Arbuckle, William V. R. Smith, James N. Jarvie and William A. Jamison, as principals, and the Fidelity and Deposit Company of Maryland, as sureties, are held and firmly bound unto the respondent, Joseph E. Blackburn, in the full and just sum of five hundred dollars, to be paid to the said Joseph E. Blackburn, his certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of April, in the year of our Lord one thousand nine hundred — one.

Whereas, lately at a circuit court of the United States for the southern district of Ohio, eastern division, in a suit depending in said court between John Arbuckle, William V. R. Smith,
88 James N. Jarvie and William A. Jamison, complainants, and said Joseph E. Blackburn, dairy and food commissioner of the State of Ohio, respondent, an order and decree was rendered against said complainants, refusing an injunction and dismissing their bill of complaint filed therein, and the said John Arbuckle, William V. R. Smith, James N. Jarvie and William A. Jamison, the complainants, have prosecuted an appeal to the United States circuit court of appeals for the sixth circuit to reverse the said order, judgment and decree therein rendered.

Now, therefore, the condition of the above obligation is such that if the said John Arbuckle, William V. R. Smith, James N. Jarvie and William A. Jamison shall prosecute said appeal to effect, and answer all damages and costs if they fail to make the said appeal

good, then the above obligation shall be void; otherwise the same shall remain in full force and virtue.

JOHN ARBUCKLE.
WILLIAM V. R. SMITH,
JAMES N. JARVIE,
WILLIAM A. JAMISON,
By BROWN & GEDDES,
Their Attorneys-in-fact.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By E. H. RHODES, *Attorney-in-fact.*

Attest:
[SEAL.] PHILIP E. UHLE, *Agent.*

Signed, sealed and delivered in presence of—
—— ——.

1 2c. int. rev. doc. stamp, Mar., 1901. Kirschner, Wideman & Co., Toledo, Ohio.
1 ½c. int. rev. doc. stamp, Mar., 1901. Kirschner, Wideman & Co., Toledo, Ohio.

Copy of resolutions authorizing the execution of certain surety bonds for the Fidelity and Deposit Company of Maryland, in the State of Ohio.

At a regular meeting of the board of directors of the Fidelity and Deposit Company of Maryland, held at the office of the company in Baltimore, Maryland, on the second day of November, 1898, the following resolutions were unanimously adopted, to wit:

Whereas, the Fidelity and Deposit Company of Maryland, has been authorized by the insurance department of the State of Ohio to transact the surety business therein, and

89 Whereas, it is often necessary, in order to facilitate the business of the company in said State to have bonds in certain cases executed upon application for same, therefore be it

Resolved, That either H. E. King, Thomas H. Tracy, G. Bloch, E. H. Rhodes or J. H. Bellows, all of the city of Toledo, State of Ohio, be and they are hereby authorized to execute and deliver, for and on behalf of the said Fidelity and Deposit Company of Maryland, all bonds required in judicial proceedings in any and all courts in said State of Ohio, and in the United States circuit court and district courts in said State, to wit: bonds for executors, administrators, trustees, receivers, assignees, guardians, committees for lunatics in replevin cases, attachment cases, injunction cases, appeal cases, bonds for security for costs, and any and all other bonds required to be given by order or decree of any court of law or equity, of the State of Ohio or the United States circuit court and districts courts for said State, the same to be attested by either Charles J. Kirschner, George J. Wideman or Philip E. Uhl, who shall attach the seal of the said company to the undertaking or bond so executed. And

any such bond, so executed, shall be binding upon the said Fidelity and Deposit Company of Maryland, to all intents and purposes, as fully as if done by the regular officers of the company in their own proper persons in its behalf.

We, Edwin Warfield, president, and H. E. Bosler, secretary, of the Fidelity and Deposit Company of Maryland, hereby certify that the foregoing is a true copy taken from the records of proceedings of the board of directors of the Fidelity and Deposit Company of Maryland.

In testimony whereof, we have hereunto subscribed our names as president and secretary, respectively, and affixed the corporate seal of the — day of November, A. D. 1898.

[SEAL.] EDWIN WARFIELD, *President.*
H. E. BOSLER, *Secretary.*

STATE OF MARYLAND, *City of Baltimore*, } *ss:*

On this 2nd day of November, A. D. 1898, before the subscriber, a notary public, of the State of Maryland, in and for the city of Baltimore, duly commissioned and qualified, came Edwin Warfield, president, and H. E. Bosler, secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in and who executed the preceding instrument and they each acknowledged the execution of the same, and being by me duly sworn severally and each for himself deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that the said corporate seal and their signature- as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal, at the city of Baltimore, the day and year first above written.

[SEAL.] FRED S. AXTELL,
Notary Public.

And afterwards, to wit, on the 2nd day of April, A. D. 1901, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Entry.

Journal —, p. —.

This day came the complainants, by Peckham, Warner & Strong and Brown & Geddes, their solicitors, and file herein and present to the court their petition praying for the allowance of appeal from the order, judgment and decree of this court, refusing an injunction and dismissing the bill of complaint herein, entered on the — day of March, 1901, and also praying that a transcript of the record, proceedings and papers upon which said order and decree were made,

duly authenticated, may be sent to the United States circuit court of appeals for the sixth circuit, and that such other and further proceedings may be had as may be proper in the premises.

And said complainants also filed with the clerk of this court, at the same time with the said petition for appeal, an assignment of errors, setting out separately and particularly each error asserted and intended to be urged.

On consideration whereof, the court does allow the claims of appeal from the order and decree, so entered, upon the complainants' filing bonds, according to law, in the sum of $500.00; and thereupon came the complainants and filed their bond on appeal in the sum of $500.00, with Fidelity and Deposit Company of Maryland as surety thereon, and conditioned according to law.

It is now here ordered that said bonds be, and it is hereby, approved by the court, and the same is entered of record.

91 Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN ARBUCKLE ET AL., Complainants,
vs.
JOSEPH E. BLACKBURN, Respondent.

Stipulation for Reduction of Record.

In the above-entitled cause, it is stipulated that the clerk, in making up the transcript of the record for the appeal herein taken by the above-named complainant-, may omit therefrom, as unnecessary for the purpose of said appeal, the following papers, to wit: Affidavit of Clarence Brown, with seventy-two exhibits attached.

It is further stipulated that an order may be entered, if the same to the court shall seem proper, in accordance with this stipulation.

Toledo, April 19, 1901.

PECKHAM, WARNER & STRONG & BROWN & GEDDES,
Solicitors for Complainants.
WALTER F. BROWN &
E. B. DILLON, *Solicitors for Respondent.*

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing is a full, true and complete transcript of the proceedings had by and before said court, and as the same appears of record in the clerk's office of said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Columbus, Ohio, this 22nd day of April, A. D. 1901.

[SEAL.]

B. R. COWEN, *Clerk,*
By ROB'T C. GEORGI,
Deputy Clerk.

92 UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

United States Circuit Court of Appeals for the Sixth Circuit.

To Joseph E. Blackburn, dairy and food commissioner of the State of Ohio, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the* first day of May, next, pursuant to a petition for appeal filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, eastern division, wherein John Arbuckle, William V. R. Smith, James N. Jarvie and William A. Jamison, partners as Arbuckle Bros., are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants as in the said petition mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this second day of April, in the year of our Lord one thousand nine hundred and *nine*, and of the Independence of the United States of America, the one hundred and twenty-fifth.

A. C. THOMPSON,
District Judge of the United States, Sitting as Circuit Judge, Southern District of Ohio.

*Not exceeding 30 days from the day of signing.

STATE OF OHIO, } ss:
County of Franklin, }

On this 6th day of April, A. D. 1901, personally appeared before me, a notary public in and for said county, Albert Bauer, a deputy United States marshal of the S. D. of O., and made oath that he delivered a copy of within citation to John M. Sheets, the attorney general of the State of Ohio, to him personally.

V. J. FAGIN,
U. S. Marshal, S. D. O.,
By ALBERT BAUER, *Deputy.*

Sworn to and subscribed before me this 6th day of April, 1901.
[SEAL.] C. P. WHITE,
Dep. Clerk U. S. Courts, S. D. O.

Fees of clerk: 45 cents.

93 *Fees.*

One service	$2 00
One copy	50
Mileage, 2 miles	12
Total	$2 62

No. 985. Marshal's civil docket No. 1637. United States circuit court, southern district of Ohio, eastern division. John Arbuckle *et al. vs.* Joseph E. Blackburn. Citation. Filed Apr. 9, 1901. B. R. Cowen, clerk. Brown & Geddes, attorneys. Security for costs furnished.

94 And afterwards to wit on December 5th 1901, an entry was made upon the journal of said court which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

ARBUCKLE
vs.
BLACKBURN.

This cause came on to be heard and was argued by Mr. John De Witt Warner and Mr. Clarence Brown for appellants and by Mr. Walter F. Brown and Mr. E. B. Dillon for appellee and was submitted.

And afterwards to wit on January 7th, 1902 a decree was entered in said cause which is in the words and figures as follows:

Decree.

95 United States Circuit Court of Appeals for the Sixth Circuit.

JOSEPH ARBUCKLE ET AL.
v.
JOSEPH E. BLACKBURN, Dairy & Food Commissioner of the State of Ohio. } No. 973.

Appeal from the circuit court of the United States for the southern district of Ohio.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause be and the same is hereby affirmed with costs.

96 And afterwards to wit on January 20th, 1902, an opinion was filed in said cause which reads and is as follows:

Opinion.

97 United States Circuit Court of Appeals, Sixth Circuit.

JOHN ARBUCKLE ET AL., Appellants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Appellee. } No. 973.

Error to the circuit court of the United States for the southern district of Ohio.

Submitted Dec. 5, 1901; decided Jan. 7, 1902.

Before Lurton and Day, circuit judges; and Wanty, district judge.

This case was brought by Arbuckle Bros. to restrain Joseph E. Blackburn, dairy and food commissioner of Ohio, from prosecuting the vendors of Ariosa, an article sold by the complainants to many dealers in Ohio, because of alleged violation of pure-food laws of the State. The substance of the bill and an amendment thereof is as follows:

The General Assembly of the State of Ohio passed in the year 1884 an act entitled "An act to provide against the adulteration of food and drugs," the substance of which is recited. For more than thirty years the complainants and their predecessors had been engaged, and still are engaged, in the manufacture and sale throughout the United States, including the State of Ohio, of a certain compound or mixture known as Ariosa, composed of roasted coffee, compounded and mixed with eggs and sugar, packed in sealed packages ready for use by the consumer. In order to preserve said product from deterioration and to retain the original strength and aroma in the coffee the complainant, Arbuckle, more than thirty years ago invented and thereafter patented, adopted and used, and complainants still use, a certain process whereby the compound or mixture known as Ariosa was and still is mixed and compounded and the separate beans thereof coated,
98 and to a large extent hermetically sealed after roasting with a compound of sugar and eggs; at first in composition with a quantity of Irish moss, also a wholesome article of food, and for twenty years without such Irish moss. That said letters patent were issued in the year 1868, and after the expiration of the said patent, trade therein was greatly increased, and still continues to increase, by reason of the increased sale and reputation of said Ariosa; that the good will of said business of making and vending said Ariosa has become and now is wholly dependent upon the reputation and sale of Ariosa and the good will aforesaid. That for many years the complainants, at great expense, widely advertised the use of the aforesaid process, that the purchasers might be informed of the good qualities of coffee so mixed, compounded and

coated; that for many years prior to 1894 every package of Ariosa was labeled in conspicuous type in the words and figures following:

"*Ariosa*"

"Is a compound made from coffee, sugar and eggs. The coffees are selected especially for their strength, flavor and superior drinking qualities, are pure, sound coffees and absolutely free from all the poisonous coloring substances which are now so largely used to improve the appearance of coffee. Coffee, when roasted, is porous, and, unless prevented, loses its best qualities, and absorbs others which are inferior to it. By our process of hermetically sealing the pores of roasted coffee, we secure a three-fold object.

"1st. The retention of the full strength and aroma for any length of time.

"2nd. The prevention, through absorption, of any injurious flavors.

"3rd. The saving to the consumer of the additional expense of eggs incurred when any other coffee is used.

"Ariosa is self-settling.

"Choice eggs and pure granulated sugar are the only articles used in hermetically sealing Arbuckle's Ariosa coffee.

"*Formula.*

"Coffee	99278
"Eggs	00361
"Sugar	00361

"Four pounds roasted coffee go as far as five pounds green, as coffee loses 20 per cent. in roasting."

That being advised of the character of the preparation known as Ariosa, and as a result of experience in the use thereof, great numbers of people have preferred and do prefer the use of Ariosa to other brands, mixtures or compounds of coffee so treated,
99 and the same is sold and purchased in large quantities throughout the United States, and has been so sold and purchased for more than thirty years last past. That the extent and profit of the complainants' business depends upon the good will thereof, and the confidence of consumers, that so long as the same is manufactured and sold by the complainants it shall be identical in quality and composition with that which, under the same brand and appearance consumers have theretofore purchased. Certain inferior compounds and mixtures are described and sold in competition with the said Ariosa, said compounds and mixtures being so treated as to conceal defects or misrepresent the real condition thereof, so as to retain water which would otherwise be eliminated from the coffee in process of roasting, so treated as to increase the weight of roasted coffee, while decreasing its worth for use; mixed and compounded with unhealthful ingredients, none of which processes or methods are used by the complainant-; but the process

adopted by them is for the purpose of retaining in the coffee the full strength and aroma thereof; preventing the absorption of any injurious or noxious gases or flavors; settling the same when prepared for use. There is nothing in said process which conceals damage or inferiority in coffee, or makes it appear better or of greater value than it really is; on the contrary, the coffee used in said compound or mixture is of a good quality and undamaged. The articles of food used in the coating thereof are in themselves pure, wholesome and healthful; said coating is colorless and transparent; said process was adopted and used, and still is used, at great expense, for the benefit of the consumer.

Complainants have on hand at various points throughout the United States large stocks of the compound and mixture known as Ariosa, in Ohio about one million pounds, more or less, of the value of one hundred thousand dollars; in the United States ten million pounds, more or less, of the value of about one million dollars. Complainants have a large number of agents in Ohio and elsewhere engaged in the sale of Ariosa, and a great number of dealers, to wit: more than ten thousand in Ohio, have in their possession large quantities of Ariosa for sale, and will continue to sell the same in preference to other brands of coffee, not similarly prepared, to the profit of complainants, and the increase of their aforesaid business and of the good will thereof.

The respondent herein, Joseph E. Blackburn, dairy and food commissioner, as aforesaid, without authority of law, and falsely
100 and erroneously construing the provisions of said statutes above set forth, notwithstanding the fact that the process used in the manufacture of the said compound or mixture known as Ariosa is not in violation of the said statute and that the said statute is not applicable to the premises, and that there is no law of the State of Ohio warranting his acts, and notwithstanding the healthful character of said Ariosa and that the same is composed of healthful ingredients, each package plainly marked as aforesaid, personally and through his agents has heretofore, and does now, and will, unless restrained by the order of the court, continue to widely advertise throughout the State that said process used in the manufacture of Ariosa is within the prohibition of and in violation of the aforesaid statute. Said Blackburn falsely claims and pretends that the sixth clause of said statute wholly forbids the glazing of the coffee used in the manufacture of Ariosa. Yet, in fact, said process does not conceal damage or inferiority, or make said coffee appear to be better or of greater value than it really is. That said coating is for the uses and purposes above set forth and is not used to affect or change the appearance of said coffee; any change in the appearance thereof due to said glazing being incidental and immaterial in the use thereof, and not such as to assimilate said coffee in appearance to other or better grades.

Respondent has menaced and threatened with prosecution, and still menaces and threatens to prosecute dealers in and vendors of Ariosa in the State of Ohio, for a violation of the aforesaid statute, and will, unless restrained by the order of the court, institute a

large number of prosecutions upon the wrongful and erroneous charge that the treatment of said Ariosa by the process aforesaid is a violation of the statute aforesaid, and that the same is an adulterated food product, within the said statute. That by reason of the official capacity of the respondent, and the fact that he claims to act under said statute intended to prevent the adulteration of food products, said respondent's statements and threats of prosecution have led, and do lead, and will hereafter continue to lead dealers in, and consumers of, said Ariosa throughout the United States, and more particularly in Ohio, to doubt the healthful character and proper preparation of the same, and will deter wholesale and retail dealers and consumers from purchasing, vending or using the same, greatly decreasing the repute and sale thereof to the great and irreparable damage of complainants.

That on or about the 5th day of February, 1901, said respondent issued a certain circular to dealers and vendors of Ariosa within the State of Ohio, of which the following is a copy:

101 "STATE OF OHIO:

"Office of dairy and food commissioner.

"DEAR SIRS: Replying to your inquiry about the coffee situation, would say that this matter is now under consideration and investigation by the chemists of this department. As soon as conclusions are reached a circular notice will be sent to all the jobbers in Ohio, and a sufficient number will be furnished to supply all their salesmen.

"I might say that the following firms have agreed to accept the law as construed by this department: Andrus, Scofield & Co., Columbus; Dayton Spice Mills, Dayton; Woolson Spice Company, Toledo.

"W. F. McLaughlin & Co., of Chicago, have agreed to comply with the laws as soon as construed by the court.

"The only firm that has refused, and still refuses to accept the ruling of this department, or abide by the laws of the State as construed by our supreme court, is Arbuckle Bros., of New York.

"Very truly yours, J. E. BLACKBURN,

"*Dairy and Food Commissioner.*

"Columbus, Ohio, February 5, 1901."

Said circular letter is wholly false in this, to wit: That complainants have not at any time refused to accept the construction of the law of Ohio as construed by the supreme court of the State; and the complainants are informed and believe that the Woolson Spice Company has not agreed to accept the said law as construed by respondent, but, on the contrary, refused, and still refuses, to accept said construction of said law, and still continues to sell coffee prepared and glazed by the processes used by them.

That said circular was sent generally to jobbers and dealers in food products in the State of Ohio; that few, if any, of them had inquired of the respondent as therein stated, but said circular was sent to dealers without any such inquiry. That said circular, by falsely

and wrongfully singling out complainants as alone refusing to accept the ruling of respondent to abide by the laws of Ohio as construed by the supreme court thereof necessarily implied that of the food products manufactured and sold by manufacturers, those made by complainants, particularly the product Ariosa, alone fell short of the standard of purity imposed by said statute; thus wrongfully and falsely implying that Ariosa is inferior in quality, grade, purity and wholesomeness to the products of other manufacturers; whereas the standard of said Ariosa in the respects stated is at least as high as that of any like product manufactured and sold by like
102 manufacturers; and unless restrained by order of court said respondent will issue other and further circulars to dealers of food products in Ohio in large quantities, cause the same to be widely published and distributed throughout the State and elsewhere, and said subsequent circulars will be directed against the complainant alone with intent, purpose and effect of discriminating against complainants and their said product and to the irreparable injury of the sale thereof, and the trade of complainants and the good will of their business.

By said circular the respondent threatens to accuse complainants and dealers in Ohio in complainants' product of a crime, and to do an injury to the property of complainants with intent to compel complainants and the dealers in said product to cease from selling and offering for sale the same within the State of Ohio; such prosecution is threatened by said respondent under his false and erroneous construction of said statute, is without authority of law and will deprive complainants of their property, of the value of the product already manufactured, and the trade and good will of their business, of vending said product within the State of Ohio, without due process of law; that said acts and the menaces and threats have worked, and will continue to work irreparable injury to the property rights of complainants, and if respondent be permitted to institute or conduct proceedings or prosecutions against the vendors of said product, or be permitted to institute or conduct proceedings or prosecutions against them, will work further irreparable injury to said property rights.

Said statute construed as respondent claims it should be is in conflict with the fourteenth amendment to the Constitution of the United States, in that it would deprive complainants of their property, by prohibiting them from selling in Ohio, and dealers in, and vendors of, food products from purchasing from the complainants pure-food products which are not injurious to health, and will destroy the value of said product as an article of commerce by prohibiting the sale thereof in the State of Ohio, and would deprive complainants of the just and lawful benefits accruing to them by reason of their property rights in said food product, and largely destroy the market value of existing stocks of Ariosa in possession of complainants in Ohio and elsewhere, and will deny to complainants and to dealers in said product in the jurisdiction of the State of Ohio, the equal protection of the law.

Ariosa is manufactured and treated according to the aforesaid

process, at complainants' factories in New York and Pennsyl-
103 vania, and not in Ohio. After being so manufactured and treated it is at said factory packed in said packages, and in said original packages shipped by complainants to Ohio, and sold in said original packages; and said statute, if construed as respondent claims it should be is a regulation by the State of Ohio of interstate commerce, and is therefore repugnant to and in violation of the third clause of section 8 of article 1 of the Constitution of the United States.

Owing to the large number of dealers in Ariosa in Ohio who will be prosecuted if said respondent be permitted to carry out his said threats and menaces, a multiplicity of suits will arise and thereby complainants' property rights will be determined in litigation to which complainants will not be and could not be parties. The interests of such dealers are, in many cases, not in common with, nor representative of, the interests of complainant-, therefore, they are in great and imminent danger that in many such suits and prosecutions no defense will be made either through lack of interest, or in wrongful collusion and conspiracy with respondent; to the great and lasting injury and prejudice of complainant-, for which they have no adequate remedy at law.

Although such prosecutions shall uniformly result in the acquittal of the person charged, yet by reason of the multiplicity thereof said prosecutions will result in deterring many, if not all dealers in food products in Ohio, in dealing in Ariosa.

The bill prays relief as follows:

1. From stating or charging that complainants' said food product, Ariosa, being a compound of pure roasted coffee, mixed, treated, coated and glazed with a preparation of sugar and eggs, according to the formula and by the process hereinbefore set forth, is an article of food adulterated within the meaning of said statute, and that the use of complainants' said process of coating and glazing the coffee, constituting the chief ingredient of Ariosa, with a preparation of sugar and eggs, as hereinbefore more particularly described, constitutes a violation of said statute, and that the importation of said Ariosa into Ohio, or the selling of, or offering for sale, the same constitutes a violation of said statute.

2. From charging the complainants herein, or any of them, or said firm of Arbuckle Brothers, or any dealers in Ariosa, with violating said statute by selling, or offering for sale, Ariosa, or with adulterating food, in violation of said statute, by reason of the aforesaid treatment and coating of the coffee forming an ingredient of Ariosa with a preparation aforesaid.

104 3. From charging the complainants, or any of them, or said firm of Arbuckle Brothers, with violating the said statute by adopting and using said process of coating above described or by selling, or offering for sale, Ariosa, so glazed.

4. From charging any dealer in Ariosa with the possession, offering for sale, or sale of, an adulterated food product within the meaning of said statute, in having in their possession, offering for sale, or selling Ariosa, so glazed.

5. From menacing and threatening any dealer in Ariosa so glazed with prosecution for having in his possession, offering for sale, or selling such Ariosa.

6. From instituting, or commencing, against any person, partnership or corporation, having in his, their, or its possession, offering for sale, or selling Ariosa, any action, suit proceeding or prosecution, based upon the treatment and coating of the coffee forming an ingredient of said Ariosa with a preparation of sugar and eggs, according to the formula and by the process, more particularly above described; and

7. That your orator may have such further relief as to the court shall seem equitable and proper in the premises.

The complainants filed an amendment to the bill as follows:

XX. The wrongful acts which said respondent threatens to do, and, unless restrained, will do, as in complainants' said bill of complaint alleged, will make unmarketable in Ohio, and to a very large extent impair and destroy the market value of the large stocks of Ariosa which complainants now have on hand in Ohio, and will to a large extent, deprive them of their said business, and the good will thereof, in Ohio, and greatly injure, if not wholly destroy, the value of the same, and enable complainants' competitors, selling in Ohio coffees treated by processes similar to, but not identical with, complainants' said process, to obtain complainants' said business, which can only be regained after long time and at great expense, and complainants will be put to other great expense in defending their said property rights in Ohio. And if, pending the final determination of this cause, said respondent shall be permitted to commit the threatened wrongs, the same will, as complainants are informed and believe, damage complainants to the extent of more than one hundred thousand dollars, an amount largely in excess of respondent's ability to respond in judgment, and thereby complainants will suffer irreparable injury unless a preliminary injunction shall be granted herein.

105 DAY, *J.*, after making the foregoing statement, delivered the opinion of the court:

As the circuit court dismissed the bill it is unnecessary to consider the testimony offered in support of the application for a temporary injunction. The matter to be reviewed is the sufficiency of the bill and amendment to warrant the intervention of a court of equity to restrain the defendant as prayed.

An analysis of the bill shows the claim to be that respondent, the dairy and food commissioner of the State of Ohio, is proceeding upon an alleged false and erroneous construction of the statutes of Ohio to prosecute persons in Ohio dealing in the complainants' product known as Ariosa, and in giving out the statement that this product is sold in violation of the laws of the State. The act passed March 20, 1884 (Bates' Ohio Stat., v. 2, secs. 4200–'1), provides against the adulteration of foods and drugs, makes it an offense within said State to manufacture for sale, offer for sale, or sell any article of food which is adulterated within the meaning of the act,

and the term "food" used therein includes all articles used as food or drink by man, whether simple, mixed or compound. It is further provided in the act that food shall be deemed to be adulterated, among other things, "if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if, by any means, it is made to appear better or of greater value than it really is." It appears that the coffee of the complainant is coated, after roasting, with a compound of sugar and eggs for the purpose, as alleged in the bill, of retaining the full strength of the coffee, "preventing the absorption of any injurious or noxious gases or flavors and settling the same when prepared for consumption," thus bringing Ariosa within the terms of the Ohio law which provides that the act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, "if each and every article sold or offered for sale be distinctly labeled as a mixture or compound with the name and per cent. of each ingredient therein, and are not injurious to health." It is claimed that, notwithstanding Ariosa is thus labeled with a statement of the elements of the compound and is not injurious to health, the food commissioner is threatening proceedings, and is claiming that the same is within the prohibition of the sixth clause of the statute above quoted making it an offense to coat an article of food whereby damage or inferiority is concealed, and the same made to appear better or of greater value than it really is. It
106 is urged that this statute "construed as respondent claims it should be," is in conflict with the fourteenth amendment of the Constitution, as it deprives the complainants of their property by prohibiting them from selling it in Ohio, and dealers from selling the same in that State, notwithstanding the same are ordinary articles of food and not injurious to health, and will destroy the market value of the product, and deny to the complainants within the jurisdiction of Ohio the equal protection of the laws. The argument is, that conceding for this purpose, that the statute is constitutional when properly construed and enforced, the respondent's wrongful construction thereof results in an infraction of the constitutional rights of the complainants. This alleged wrong construction when analyzed, amounts to this: The complainants claim that their compound is not within the terms of the statute, the food commissioner wrongfully claims that it is. Upon this branch of the case the question is: May a court of equity entertain a bill to inquire into this matter, and if it finds that the complainant- *is* right in its contention enjoin the food commissioner from instituting proceedings under the laws of Ohio? The jurisdiction of courts of equity has never been carried to this extent in authoritative decisions. On the contrary the Supreme Court in more than one instance has denied such jurisdiction to a court of equity. The rule is thus stated by Mr. Justice Gray, *In re* Sawyer, 124 U. S., 200–211:

"The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit

already pending before it, and to try the same right that is in issue there.

"Attorney General *v.* Cleaver, 18 Ves., 211, 220; Turner *v.* Turner, 15 Jurist, 218; Saull *v.* Browne, L. R. 10 Ch. 64; Kerr *v.* Preston, 6 Ch. D. 463.

"Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. Story Eq. Jur., sec. 893.

"And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under the statutes of the State, or under municipal ordinances.

"West *v.* Mayor, etc., of New York, 10 Paige, 539; Davis *v.* American Society for Prevention of Cruelty to Animals, 75 N. Y. 362; Tyler *v.* Hamersley, 44 Conn. 419, 422; Stuart *v.* Board of Supervisors, 83 Illinois, 341; Devron *v.* First Municipality, 4 La. Ann. 11; Levy *v.* Shreveport, 27 La. Ann. 620; Moses *v.* Mayor, etc., of Mobile, 52 Alabama, 198; Gault *v.* Wallis, 53 Georgia, 675;
107 Philips *v.* Mayor, etc., of Stone Mountain, 61 Georgia, 386; Cohen *v.* Goldsboro Commissioners, 77 No. Car. 2; Waters Peirce Oil Co. *v.* Little Rock, 39 Arkansas, 412; Spink *v.* Francis, 19 Fed. Rep. 670, and 20 Fed. Rep. 567; Suess *v.* Noble, 31 Fed. Rep. 855."

In the later case of Harkrader *v.* Wadley, 172 U. S. 148, the same rule is recognized and enforced. Mr. Justice Shiras, at page 169, speaking for the court, says:

"No case case can be found where an injunction against a State officer has been upheld where it was conceded that such officer was proceeding under a valid State statute. In the present case, the Commonwealth's attorney, in the prosecution of an indictment found under a law admittedly valid, represented the State of Virginia, and the injunctions were, therefore, in substance injunctions against the State. In proceeding by indictment to enforce a criminal statute the State can only act by officers or attorneys, and to enjoin the latter is to enjoin the State. As was said in *In re* Ayers, 123 U. S., 443, 497: 'How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys and its agents? And if all such officers, attorneys and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?'"

Upon the authority of this case and others decided in the Supreme Court it seems clear that this action cannot be maintained consistently with the eleventh amendment to the Constitution, withholding the judicial power of the United States from suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or citizens or subjects of any foreign State.

In Poindexter *v.* Greenhow, 114 U. S. 270–287, quoted with approval in *In re* Ayers, 123 U. S. *supra*, it was said "that the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties

to the record." In the Ayers case the suit for injunction which the court held could not be entertained was brought against the attorney general and treasurers of counties, cities and towns in Virginia, just as the present case is brought against Joseph E. Blackburn, dairy and food commissioner of Ohio. The injunction sought is against the prosecution of suits in the Ohio courts which are about to be instituted by Blackburn, not in his individual capacity, but as an officer of the State. By the terms of the statute the dairy and food commissioner is an officer of
108 the State expressly charged with the enforcement of all laws against frauds and adulterations or impurities in foods, drink, or drugs, and unlawful labeling in the State of Ohio. It is made his duty by statute to prosecute, or cause to be prosecuted, any person or persons, firm or firms, corporation or corporations, engaged in the manufacture or sale of any adulterated article or articles of food or drink, or adulterated in violation of or contrary to any laws of the State of Ohio.

Bates' Ohio Statutes, vol. 1, secs. 409–7, 409–8.

It is also provided that food so coated as to conceal damage or inferiority shall be deemed to be adulterated. Paragraph (6) of section 4200–'6, vol. 2, Bates' Ohio Statutes.

What then is the object of the injunction sought in this case? It is no more or less than to restrain the officer of the State from bringing prosecutions for violations of an act which such officer is expressly charged to enforce in the only way he is authorized to proceed, by bringing criminal prosecutions in the name of the State. This is virtually to enjoin the State from proceeding through its duly qualified and acting officers. If the food commissioner may be enjoined from instituting such prosecutions, why may not the prosecuting attorney or any officer of the State charged with the execution of the criminal laws of the State? While the State may not be sued, if the bill can be sustained against its officers it is as effectually prevented from proceeding to enforce its laws as it would be by an action directly against the State.

This view of the case, in our judgment, is amply sustained by the cases above recited and by the later case of Fetts *v.* McGhee, 172 U. S. 516, in which the subject is fully discussed by Mr. Justice Harlan. In so far as this action seeks an injunction against the respondent from proceeding to enforce by prosecution the provisions of the statutes of Ohio above cited the courts of the United States are deprived of jurisdiction by the eleventh amendment to the Constitution.

We are now dealing with an officer of a State proceeding under a valid law of the State, and whose error lies in wrongfully construing the statute so as to include the complainants' product. To entertain the bill in this aspect would be to subvert the administration of the criminal law and deny the right of trial by jury by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found

guilty. It would be the extension of equity jurisdiction to
109 cases where prosecutions in State courts, by the State officers, are sought to be enjoined with a view to determining whether they shall be allowed to proceed under valid statutes in the courts of law. We think this an enlargement of the jurisdiction opposed to reason and authority. It is claimed, however, that conceding that a court of equity cannot enjoin the prosecution of criminal offenses as a general thing, the rule is different when property rights are involved, and we are cited to cases holding that equity has jurisdiction to enjoin acts likely to be destructive of property rights although the acts complained of constitute infractions of the criminal law. This is quite a different proposition from enjoining criminal proceedings alleged to be indirectly destructive of property rights.

Many criminal prosecutions may affect the property of the person accused. A property may be greatly injured by the wrongful and unfounded charge that it is used for immoral purposes. Such prosecution may destroy its rental value and prevent its sale, yet a court of equity could not usurp the right of trial which both the State and the accused have in a common-law court before a jury. Every citizen must submit to such accusations if lawfully made, looking to the vindication of an acquittal and such remedies as the law affords for the recovery of damages.

It is often a great hardship to be wrongfully accused of crime, but it is one of the hardships which may result in the execution of the law against which courts of equity are powerless to relieve. Quess *v.* Noble, 31 Fed. 855; Hemsley *v.* Meyers, 45 Fed. 283; Kramer *v.* Board of Police, 63 N. Y. Superior Ct. 492; Food Co. *v.* McNeal, 1 Ohio N. P. 266.

It is further claimed that the act is unconstitutional as an interference with the right of Congress to regulate interstate commerce, and we are cited to Schollenberger *v.* Pennsylvania, 171 U. S. 1, in which a law of that State was held invalid to the extent that it prohibited the introduction of oleomargarine into the State from another State in original packages. The case was distinguished from the prior case of Plumley *v.* Massachusetts, 155 U. S. 461, in which the Supreme Court upheld a statute punishing the sale of oleomargarine when colored in imitation of butter. In other words, the Supreme Court held it to be within the power of the State to require an article of food to be sold for what it really is, and to protect the public from imposition in buying one article of food in the belief that it is another, but beyond the power of the State to prohibit the introduction and sale in original packages of a pure article sold upon its merits.

110 As we read the Ohio statute it does not undertake to prohibit the introduction and sale of a pure article of food, sold for what it really is, but the coloring, coating or polishing of an article whereby damage or inferiority is concealed; the act providing in this connection that it shall not apply to mixtures or compounds recognized as ordinary articles of food, if every package sold or offered for sale be distinctly labeled as a mixture or compound, with

the name and per cent. of each ingredient therein, and is not injurious to health. The enactment of such a law is clearly within the police powers of the State upon the principles enunciated in the case of Plumley *v.* Mass. *supra*, for the protection of purchasers of food from imposition by the concealment of damage or inferiority in food. As in the oleomargarine case the article is thus required to be sold for what it really is, without misleading the purchaser to buy it for what it is not. In the Plumley case Mr. Justice Harlan, speaking for the court, said: "If there be any subject over which it would seem the States ought to have plenary control and the power to legislate which it ought not to be supposed was intended to be surrendered to the General Government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States."

But it is argued that coffee treated so as to make Ariosa is a pure article of food, and a compound labeled as required by the statute. Again the act is argued to be unconstitutional because of the construction put upon it by the food commissioner, and this "construction" is his contention that Ariosa is coffee so coated as to conceal damage or inferiority, and that it is not a compound or mixture within the meaning of the statute. These are the very questions that the statute vests in the discretion of the commissioner as a preliminary matter in determining to institute prosecutions in the enforcement of the law which he is charged to execute, leaving the guilt or innocence of the party charged to be decided by the proper tribunals when prosecutions are instituted under the law. The constitutionality of the act is to be determined by its language and purpose, and not by the alleged wrongful institution of prosecutions thereunder against those guiltless of a violation of its provisions.

111 There are cases, as insisted by the learned counsel for the complainant, where the operation of a statute constitutional in itself, as administered by the State authorities may deprive the citizens of rights secured by the Constitution of the United States, where a Federal court will interfere by injunction to secure to persons aggrieved the benefits of the Federal Constitution, but they are not cases where a court of equity must draw to itself the administration of the criminal law of a State sought to be enforced by the officers of that State, and thus determine whether crimes may be prosecuted under valid enactments, because a party may be able to satisfy the court that he is in fact innocent of the charge. Such a construction of the powers of a court of equity would result in a confusion of jurisdiction, and an embarrassment of the ordinary processes of the law, without precedent. If this bill can be entertained it remits to the Federal courts the supervision of the pure-food laws of the States and their dockets will be crowded with cases of those claiming that their particular articles of food and drink are not within the terms of the law.

Nor do we think that there is ground for injunction in the allegations of the bill that the food commissioner is publishing the fact that the product of the complainant- is within the prohibition of the law. If this publication is made to those dealing in the article it would be within the duty of the commissioner, in advising of contemplated prosecutions; if such publications are libelous the law affords other means of redress. Francis *et al. v.* Flinn, 118 U. S., 385.

The fact that complainants produced Ariosa under a process protected by letters patent of the United States does not prevent it from coming within the operation of laws passed in the exercise of the police power of the State. The enactment of laws for the protection of health and to prevent imposition in the sale of food products is within this power, and the fact that the process by which it is made is protected by a patent, while it may prevent others from using it during the life of the patent, does not deprive the State of this power of regulation for the general good. Patterson *v.* Kentucky, 97 U. S. 501; Palmer *v.* The State, 39 O. S. 236.

The fact that complainants' product is widely sold in Ohio, and many persons may be subject to prosecution, does not enlarge the jurisdiction of a court of equity to interfere by injunction to control prosecution for alleged violation of the laws of the State.

We think this case comes within the principles settled by the Supreme Court in the cases above cited, and the circuit court did not err in dismissing the bill.

112 And afterwards to wit on May 10th 1902, petition for allowance of appeal was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, and William A. Jamison, Plaintiffs, Appellants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Defendant, Respondent.

Petition for Allowance of Appeal.

The above-named plaintiffs, John Arbuckle, William V. R. Smith, James N. Jarvie and William A. Jamison, conceiving themselves aggrieved by the decree entered on the seventh day of January, 1902, in the above-entitled proceeding, do hereby appeal from said decree to the Supreme Court of the United States and pray that this appeal may be allowed, and that the transcript of the record and proceedings and papers upon which said decree was made, duly

authenticated, may be sent to the Supreme Court of the United States.

PECKHAM, WARNER & STRONG,
111 *Broadway, New York, New York,*
BROWN, GEDDES & BODMAN,
417 *The Valentine, Toledo, Ohio,*
Attorneys for Plaintiffs and Appellants.

Toledo, Ohio, May 5, 1902.

And now, to wit, on May 10, 1902, it is ordered that an appeal be allowed as prayed for.

HORACE H. LURTON,
Circuit Judge.

113 And afterwards on the same day, to wit on May 10, 1902 an order granting said appeal was entered which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, & William A. Jamison, Plaintiffs, Appellants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio.

This day came the plaintiffs and appellants, John Arbuckle, William V. R. Smith, James N. Jarvie and William A. Jamison, by Peckham, Warner & Strong and Brown, Geddes & Bodman, their solicitors, and filed herein and presented to the court their petition, praying for the allowance of an appeal from the decree of this court, entered the seventh day of January, 1902, affirming the judgment, order and decree of the United States circuit court for the southern district of Ohio, eastern division; and also praying that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

And said plaintiffs and appellants also filed with the clerk of this court, at the same time with the said petition for appeal, their bond on appeal, in the sum of five hundred dollars with Fidelity & Deposit Company of Maryland as surety thereon and conditioned according to law.

In consideration whereof, the court does allow the claim of appeal before mentioned and it is now here ordered that said bond be and it is hereby approved by the court and the same is entered of record.

114 And afterwards to wit on May 10th an assignment of errors was filed which reads and is as follows:

Assignments of Error.

115 In the United States Circuit Court of Appeals, Sixth Circuit.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, and William A. Jamison, Complainants, Appellants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Respondent, Appellee.

Assignment of Errors.

And now come the aforesaid John Arbuckle, William V. R. Smith, James N. Jarvie and William A. Jamison, complainants and appellants, by Peckham, Warner & Strong and Brown, Geddes & Bodman, their solicitors, and say that the order and decree made and entered in said suit on the 7th day of January, 1902, are erroneous and against the rights of said complainants for the following reasons:—

First. Because the court erred in affirming the judgment of the circuit court.

Second. Because the court erred in not reversing the judgment of the circuit court and remanding the cause thereto, with instructions to overrule the demurrer of the respondent.

Third. Because the court erred in holding that the circuit court had no jurisdiction to entertain this suit.

Fourth. Because the court erred in holding that the circuit court was without jurisdiction to restrain the respondent, for the reason that to do so would contravene the provisions of the eleventh amendmend of the Constitution of the United States.

116 Fifth. Because the court erred in holding that the circuit court was without jurisdiction to restrain the respondent, for the reason that it had no power to enjoin criminal prosecutions.

Sixth. Because the court erred in affirming the judgment of the circuit court, dismissing the complainants' bill of complaint.

Seventh. Because the court erred in affirming the judgment of the *court* court, refusing the preliminary injunction prayed for by these complainants.

Eighth. Because the court erred in affirming the judgment of the circuit court, refusing the restraining order prayed for by these complainants.

Ninth. Because the court erred in holding that the statute of the State of Ohio in complainants' bill set forth (sec. 4200–'6 R. S.) is constitutional and valid.

Tenth. Because the court erred in holding that the circuit court was without jurisdiction to restrain the respondent.

Eleventh. Because the court erred in holding that the statute of the State of Ohio set forth in complainants' bill (R. S. 4200–'6) was not unconstitutional as an interference with the right of Congress to regulate interstate commerce.

PECKHAM, WARNER & STRONG,
BROWN, GEDDES & BODMAN,
Solicitors for Complainants and Appellants.

117 And afterwards to wit on June 2nd 1902, an order was entered upon the journal of said court which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, and William A. Jamison, Complainants and Appellants,
vs.
JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Defendant, Respondent.

Journal Entry.

On this 2 day of June, 1902, came complainants and appellants, John Arbuckle, William V. R. Smith, James N. Jarvie, and William A. Jamison, by Peckham, Warner & Strong and Brown, Geddes & Bodman, their solicitors, and, by leave of court first obtained, filed herein and presented to the court their amendment to the assignment of errors already filed, and asked that they be entered as of the date of the filing of their original assignments of error, which was May 10, 1902.

In consideration whereof the court does allow said amended assignment of errors to be filed, and it is now here ordered that the same be entered as of the 10th day of May, 1902.

And on the same day to wit on June 2nd 1902, pursuant to said order an amendment to the assignments of error was filed clothed in the words and figures as follows:

118 United States Circuit Court of Appeals for the Sixth Circuit.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE, and William A. Jamison, Complainants, Appellants,
vs.
JOSEPH E. BLACKBURN, Dairy and food Commissioner of the State of Ohio, Defendant, Respondent.

Amendment to Appellants' Assignment of Errors.

And now come the aforesaid John Arbuckle, William V. R. Smith, James N. Jarvie and William A. Jamison, complainants and appellants, by Peckham, Warner & Strong and Brown, Geddes & Bodman, their solicitors, and say that the order and decree made and entered in said suit on the 7th day of January, 1902, are erroneous and against the rights of said complainants and appellants for the following reasons, in addition to the reasons assigned in the original assignment of errors filed by these complainants and appellants:—

Twelfth. Because the court erred in refusing to hold that the statute of the State of Ohio, in complainants' bill set forth (sec. 4200–6 R. S.) is unconstitutional and void.

Thirteenth. Because the court erred in refusing to hold that the statute of the State of Ohio set forth in complainants' bill (R. S.

sec. 4200–'6) was unconstitutional as an interference with the right of Congress to regulate interstate commerce and an attempt by the State of Ohio to exercise such right.

Fourteenth. Because the court erred in holding that the statute of the State of Ohio, set forth in complainants' bill (R. S. sec. 4200–'6) as construed and threatened to be enforced by respondent,
119 is unconstitutional and in conflict with the fourteenth amendment to the Constitution of the United States.

Fifteenth. Because the court erred in refusing to hold that the statute of the State of Ohio, set forth in complainants' bill (R. S. 4200–'6) as construed and threatened to be enforced by respondent, was unconstitutional and in conflict with the fourteenth amendment to the Constitution of the United States.

Sixteenth. Because the court erred in refusing to find that Ariosa is a mixture or compound, recognized as an ordinary article or ingredient of an article of food.

Seventeenth. Because the court erred in refusing to find that the circuit court had jurisdiction to restrain the respondent from stating or charging Ariosa to be adulterated; or that complainants' process of coating and glazing set forth in the bill, is in violation of the statute of the State of Ohio set forth in the bill (R. S. 4200–'6); or that the importation into Ohio of said Ariosa, or the selling of or offering for sale the same, constitutes a violation of such statute, or from charging any dealer in Ariosa with the possession, offering for sale or sale of an adulterated food product within the meaning of the statute of the State of Ohio (R. S. 4200–'6) in possessing, offering for sale, or selling Ariosa glazed as set forth in the bill; or from menacing or threatening any dealer in Ariosa so glazed, with prosecution for having in possession, offering for sale, or selling, such Ariosa.

PECKHAM, WARNER & STRONG,
BROWN, GEDDES & BODMAN,
Solicitors for Complainants and Appellants.

120 And on the same day to wit on May 10th 1902, a bond was filed clothed in the words and figures as follows:

Bond.

Bond on writ of error or appeal.

121 Know all men by these presents, that we, John Arbuckle, Wm. V. R. Smith, James N. Jarvie and Wm. A. Jamison, as principals, and The Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the respondent Joseph E. Blackburn, in the full and just sum of five hundred dollars ($500) to be paid to the said Joseph E. Blackburn, his certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifth day of May in the year of our Lord one thousand nine hundred and two.

Whereas lately in the United States circuit court of appeals, sixth circuit, in a suit depending in said court, between John Arbuckle, Wm. V. R. Smith, James N. Jarvie and Wm. A. Jamison, complainants, and said Joseph E. Blackburn, dairy and food commissioner of the State of Ohio, respondent, a decree was rendered against the said complainants on the seventh day of January, 1902 and the said John Arbuckle, Wm. V. R. Smith, James N. Jarvie and Wm. A. Jamison, complainants having prosecuted an appeal to the Supreme Court of the United States to reverse said decree.

Now, the condition of the above obligation is such, that if the said John Arbuckle, Wm. V. R. Smith, James N. Jarvie and Wm. A. Jamison shall prosecute said appeal to effect, and answer all damages and costs if they fail to make said appeal good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

JOHN ARBUCKLE,
WM. V. R. SMITH,
JAMES N. JARVIE, AND
WM. A. JAMESON,
By BROWN, GEDDES & BODMAN,
Their Att'ys-in-fact.
FIDELITY AND DEPOSIT CO.
OF MARYLAND,
By E. H. RHOADES, JR., *Att'y-in-fact.*

[SEAL.]

Attest: PHILIP E. UHL, *Agent.*

Approved by—

—— ——.

122 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of John Arbuckle *et al. vs.* Joseph E. Blackburn, dairy and food commissioner of the State of Ohio No. 973, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 2d day of June A. D. 1902.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 18,578. U. S. C. C. of appeals, 6th circuit. Term No. 350. John Arbuckle, William V. R. Smith, James N. Jarvie & William A. Jamison, appellants, *vs.* Joseph E. Blackburn, Dairy & Food Commissioner of the State of Ohio. Filed June 7", 1902.

Supreme Court of the United States.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE and WILLIAM A. JAMISON, Appellants, vs. JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Appellee.	Brief for Appellants.

I.

Statement of the Case.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Sixth Circuit, affirming the decree of the Circuit Court of the United States for the Southern District of Ohio, dismissing the bill herein.

The action was for injunction. The dismissal of the bill was upon hearing, before answer, on application for preliminary injunction. No answer was ever filed. The allegations of the bill therefore stand uncontradicted, as on demurrer.

The only question seriously argued or considered below has been as to the jurisdiction of the court to grant such relief.

The bill of complaint herein sets forth:

The complainants, copartners doing business under the name of Arbuckle Brothers, are all residents of New York State (Rec., p. 2).

The respondent is a resident of Ohio, and the Dairy and Food Commissioner of that State (Record, p. 2).

Arbuckle Brothers manufacture in New York and Pennsylvania, exclusively, Ariosa, a preparation of coffee, in general use for ordinary food purposes, etc., and ship it into Ohio on orders for sale there; where stocks of a million pounds, of value $100,000 are kept by plaintiffs, besides large quantities kept on hand by more than ten thousand others, wholesale and retail dealers (Rec., p. 6).

As thus marketed, Ariosa is a mixture or compound of roasted coffee, eggs and sugar, each a common, healthy, and unobjectionable article of food, and pure, wholesome and healthful (Rec., pp. 5 and 6).

Ariosa is thus prepared: The sugar and egg ingredients thereof are made, by the aid of water, into a paste or glaze, and by mechanical means so applied to the coffee berry while freshly roasted as, first, completely to coat it with such glaze, and then, the water portion of the glazing being dried out by applied heat and air, to leave the coffee-berry hermetically sealed by a transparent colorless coating of mixed sugar and eggs. The physical tendency and effect of this is to prevent or retard both the loss by the coffee of its aroma or other qualities, and the acquisition by it, from the air, of foreign matter (Rec., p. 3).

Its effect upon the appearance of the coffee is that of varnish, not assimilating it to other grades of coffee or changing its size, but accentuating the color of each berry, as well as the contrast between normal berries and those which are darker or lighter, larger or smaller (Rec., p 7).

Ariosa is thus imported into Ohio and there ex-

posed for sale, exclusively in the original packages in which it is packed at Brooklyn, N. Y., each containing one pound, securely wrapped in a closed and sealed wrapper, which is entirely opaque, and which is distinctly labeled with a printed statement of its exact composition, and the proportion of each of its ingredients (Rec. p. 10).

Above has been the case for more than thirty years, that is to say: A similar mixture or compound of coffee, similarly prepared and packed, and bearing a similar statement, has been marketed throughout Ohio by complainants and their predecessors, under the name Ariosa. During all that time and now, it neither has been sold, nor exposed for sale or sold, in such manner as to disclose to the purchaser the appearance of Ariosa, or of the coffee-berries included therein, except in so far as he may infer the same from his former experience in its use, or be informed by such printed statement on the package, which is as follows (Rec., p. 4).

"ARIOSA"

"Is a Compound made from coffee, sugar and eggs.

"The coffees are selected especially for their strength, flavor, and superior drinking qualities, are pure, sound coffee, and absolutely free from all the poisonous coloring substances which are now so largely used to improve the appearance of coffee. Coffee when roasted is porous, and, unless prevented, loses its best qualities and absorbs others which are injurious to it. By our process of HERMETICALLY SEALING the pores of roasted coffee we secure a threefold object:

"1st. The retention of the full strength and aroma for any length of time.

"2nd. The prevention through absorption of any injurious flavors.

"3rd. The saving to the consumer of the additional expense of eggs incurred when any other coffee is used. 'Ariosa' is self-settling.

"Choice eggs and pure granulated sugar are the only articles used in HERMETICALLY SEALING ARBUCKLE'S ARIOSA COFFEE.

"FORMULA."

Coffee	.99278
Eggs	.00361
Sugar	.00361

"Four Pounds Roasted Coffee goes as far as Five Pounds Green, as Coffee loses 20 per cent. in roasting."

By act of the Legislature of Ohio, passed March 20, 1884 (and since amended, but not in particulars material here), entitled:

"*An Act to provide against the adulteration of food and drugs,*"

the sale or offer for sale of any adulterated drug or article of food within the State of Ohio is prohibited; and in the body of such act it is provided that an article shall be considered adulterated within the intent of the act. In the case of food:

* * * "(6) If it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is" (Rec., p. 3) (provided, however, that)

"The provisions of this act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, if each and every package sold or offered for sale be distinctly labeled as mixtures or compounds, with the name and per cent. of each ingredient therein, and are not injurious to health."

As thus manufactured and shipped into Ohio by complainants, and as sold or offered for sale in Ohio, Ariosa is neither so colored, coated, polished or powdered as to conceal damage or inferiority, or in any way made to appear better or of greater value than it really is, nor in any way such that the sale or offer for sale thereof is within the prohibition of said statute (Rec., pp. 5–7).

Nevertheless, the defendant, both personally and through his agents, has heretofore, does now, and will, unless restrained by the Court, continue to widely advertise, give out and state that said process used in the manufacture of said Ariosa, is within the prohibition of, and in violation of, the aforesaid statute, and that clause (6) above quoted wholly forbade the glazing of coffee as in said manufacture of Ariosa.

Respondent has also menaced and threatened with prosecution and still menaces and threatens to prosecute dealers in and vendors of said Ariosa in Ohio, for a violation of said statute, and unless restrained by injunction will institute a large number of prosecutions against such dealers in and vendors of Ariosa, upon the wrongful and erroneous charge that the treatmont of said Ariosa by said process is a violation of said statute, and said Ariosa an adulterated food product within said statute, and the prohibition thereof.

By reason of respondent's official capacity, and the fact that he claims to act under the said statute intended to prevent the adulteration of food products, respondent's statements and threats of prosecution have led, do lead, and will hereafter continue to lead, the dealers in and consumers of Ariosa throughout the United States, and more particularly in Ohio, to doubt the healthful character and proper preparation of the said food product and the integrity of the complainants, as manufacturers thereof, and have deterred, do deter, and will hereafter deter, both wholesale and retail dealers and consumers in Ohio and elsewhere from purchasing, vending or using Ariosa (Rec., p. 7).

On or about the fifth day of February, 1901, the respondent, for the purpose of intimidating the customers of the complainants, and deterring them from purchasing or dealing in said Ariosa, issued, or caused to be issued, over his signature, to dealers in and vendors of Ariosa, and others, within Ohio, a

certain circular letter or statement in the words and figures following, to wit:

"STATE OF OHIO,
"OFFICE OF DAIRY AND FOOD COMMISSIONER.

"DEAR SIRS: Replying to your inquiry about the coffee situation, would say that this matter is now under consideration and investigation by the chemists of this department. As soon as conclusions are reached, a circular notice will be sent to all the jobbers in Ohio, and a sufficient number will be furnished to supply all their salesmen.

I might say that the following firms have agreed to accept the law as construed by this department: Andrus, Scofield & Co., Columbus; Dayton Spice Mills, Dayton; Woolson Spice Co., Toledo.

W. F. McLaughlin & Co., of Chicago, have agreed to comply with the laws as soon as construed by the Court.

The only firm that has refused, and still refuses to accept the ruling of this department, or to abide by the laws of the State as construed by our Supreme Court, is Arbuckle Bros., of New York.

"Very truly yours,
"J. E. BLACKBURN,
"Dairy and Food Commissioner.
"COLUMBUS, OHIO, February 5, 1901."
(Rec., pp. 7 and 8.)

Said circular letter or statement was wholly false in this, to wit, that complainants had not at any time refused to accept said construction of said statute as construed by the Supreme Court of said State, and also in that the Woolson Spice Company had not agreed to accept the said law as construed by respondent, but on the contrary, had refused, and still refuse, to accept such construction and still continued to sell in the State of Ohio coffee prepared and glazed by processes for a long time used by them (Rec., p. 8).

Respondent's said circular, while purporting to be an answer to an inquiry, was in fact by said re-

spondent sent generally to jobbers and dealers in food products within Ohio, few, if any, of whom had, in fact, inquired as therein stated, and was so circulated, without such inquiry, for the purpose of intimidating complainants and their customers, and with the effect of injuring complainants and their property (Rec., p. 8).

In pursuance of his wrongful and unlawful intention of intimidating the complainants and their customers in Ohio, and of deterring them from the purchase and sale of Ariosa, respondent, unless restrained by the Court, will, as announced in his aforesaid circular, issue other and further circulars to dealers in food products in Ohio in large quantities, and will cause the same to be widely published and distributed throughout Ohio and elsewhere; and such subsequent circulars will be directed against the complainants alone, with the intent, purpose and effect of discriminating against complainants and their said product, and of irreparable injury to the sale thereof, the value of the existing stocks thereof in Ohio, and the trade of complainants and the good-will of their business (Rec., p. 9.)

The unconscionable nature of the Commissioner's claims and threatened procedure, the multiplicity of suits involved, the irreparable damage to complainants and the inadequacy of any remedy except resort to equity are fully set forth (Rec., pp. 6–11).

One of the grounds on which the Federal courts were asked to take jurisdiction was that the plaintiffs, being residents of New York, were non-residents of Ohio, the State of defendant's residence.

Others were:

1. Said statute, construed as respondent claims it should be, is in conflict with the fourteenth amendment to the Constitution of the United States, and void, (*a*) in that it would deprive complainants of their aforesaid property by prohibiting them from selling in Ohio, and dealers in, and vendors of, food

products from purchasing from the complainants pure food products, which are ordinary articles of food and are not injurious to health, to wit: coffee, sugar and eggs, &c., (Rec., p. 9), and (*b*), that this would deprive complainants not only of their property rights acquired in said food products as aforesaid, but, further, would largely destroy the market value of the existing stock of Ariosa in the possession of complainants in Ohio and elsewhere, and would deny to complainants and to the dealers in and vendors of said Ariosa within the jurisdiction of the State of Ohio the equal protection of the law (Rec., p. 10).

2. Ariosa is manufactured and treated, according to the aforesaid process, at complainants' factories in New York and Pennsylvania, and not in Ohio. After being so manufactured and treated in its said factories, packed in packages, and is, in said original packages, shipped by complainants into Ohio, and is sold in such original packages, and said statute, if construed as the respondent herein claims it should be, is a regulation by the State of Ohio of interstate commerce, and is repugnant to and in violation of the third clause of section eight of article one of the Constitution of the United States and void (Rec., p. 10).

In addition to these grounds for federal jurisdiction alleged by complainants, still another was raised by the Court in its judgment of dismissal, from which this appeal was taken, its opinion stating as one ground therefor:

> "It seems clear that this action cannot be maintained consistently with the eleventh amendment to the Constitution withholding the judicial power of the United States from suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or citizens or subjects of any foreign State" (Rec., p. 85).

As grounds for the relief asked the bill also alleges, that, "owing to the number of dealers in and vendors of Ariosa in Ohio, who would, under the respondent's wrongful and erroneous construction of said statute, be liable to prosecution and so prosecuted if the respondent were permitted to carry out his said threats and menaces, a multiplicity of suits would necessarily arise in many local courts, involving identical questions relating to the existence, constitutionality, construction, scope and effect of said statute and to the complainants' rights of property in Ohio, and to the effect thereon of said statute, wherein complainants' rights of property in Ohio would be adjudicated in litigations to which complainants would not be, and could not be, parties; all to the great and lasting prejudice and damage of complainants, who would there have no adequate remedy at law in the premises (Rec., p. 10).

That the interests of dealers who might be prosecuted were, in many cases, not in common with, nor representative of, those of complainants', and, therefore, that there was great and imminent danger that in many of such suits and prosecutions, either through lack of interest or in wrongful collusion and conspiracy with the respondent, no defense would be made by the defendants therein, and that thereby the question of the construction of said statute would, in many of said suits and prosecutions, not be properly or skillfully presented and passed upon.

That although such prosecutions should uniformly result in the acquittal of the persons thereby charged, yet by reason of the multiplicity thereof and the avowed determination of the respondent to prosecute all persons selling, or offering for sale, in Ohio, complainants' said product, the mere wrongful prosecutions and threat of such will result in deterring many, if not all, dealers in food products in Ohio, from dealing in Ariosa, and thereby prevent complainants from selling their said product in

said State, to complainants' great and irreparable injury (Rec., p. 11).

That by the said statements, menaces and threats of the respondent and the prosecutions threatened to be instituted by him, complainants' trade, in Ohio and elsewhere, the good-will thereof, and the market value of the existing stocks of Ariosa in the possession of complainants, would be damaged, depreciated and diminished in value to the extent of more than one hundred thousand dollars (Rec., p. 11).

In conclusion, complainants prayed that the respondent be enjoined:

> "1. From stating or charging that complainants' said food product, Ariosa, being a compound of pure roasted coffee, mixed, treated, coated and glazed with a preparation of sugar and eggs, according to the formula and by the process hereinbefore set forth, is an article of food adulterated within the meaning of said statute, and that the use of complainants' said process of coating and glazing the coffee, constituting the chief ingredient of Ariosa, with a preparation of sugar and eggs, as hereinbefore more particularly described, constitutes a violation of said statute, and that the importation of said Ariosa into Ohio, or the selling of, or offering for sale, the same constitutes a violation of said statute.
>
> 2. From charging the complainants herein, or any of them, or said firm of Arbuckle Brothers, or any dealer in Ariosa, with violating said statute by selling, or offering for sale, Ariosa, or with adulterating food, in violation of said statute, by reason of the aforesaid treatment and coating of the coffee forming an ingredient of Ariosa with a preparation aforesaid.
>
> 3. From charging the complainants, or any of them, or said firm of Arbuckle Brothers, with violating the said statute by adopting and using said process of coating above described, or by selling, or offering for sale, Ariosa, so glazed.
>
> 4. From charging any dealer in Ariosa with the possession, offering for sale, or sale of, an

adulterated food product, within the meaning of said statute, in having in their possession, offering for sale, or selling Ariosa, so glazed.

5. From menacing and threatening any dealer in Ariosa so glazed with prosecution for having in his possession, offering for sale, or selling such Ariosa.

6. From instituting, or commencing, against any person, partnership or corporation, having in his, their or its possession, offering for sale, or selling Ariosa, any action, suit, proceeding or prosecution, based upon the treatment and coating of the coffee forming an ingredient of said Ariosa with a preparation of sugar and eggs, according to the formula and by the process more particularly above described; and

7. And for such further relief as to the court might seem equitable and proper in the premises" (Rec., p. 12.)

This bill, coming before the Circuit Court of the United States for the Southern District of Ohio, on application for temporary injunction, the Court denied the application and dismissed the bill, on grounds shown by the opinion filed (Rec., pp. 65–68):

"The complainants, in their bill, alleged, in substance, that they manufacture and sell a preparation of coffee, known as Ariosa, which 'is a mixture or compound of roasted coffee, eggs and sugar—each a common, healthy and unobjectionable article of food'; that they have manufactured and sold it for more than thirty years; that it has gained great repute and sale and is generally used in Ohio and throughout the United States; that the good-will of the business of its manufacture and sale has become very valuable; that it is sold in Ohio in one-pound packages, which, in compliance with the laws of Ohio, providing against the adulteration of food, is distinctly labeled with a printed statement of its precise composition and the proportion of each of its ingredients; but that notwithstanding these facts the respondent, as dairy and food commissioner of Ohio, has notified complainants that he considers Ariosa, as put up by them,

an adulteration, and has issued a circular letter to dealers and vendors wrongfully charging that complainants in the manufacture and sale thereof, refuse to abide by the laws of Ohio, providing against the adulteration of food, and proposes to institute prosecutions to prevent and punish its sale or offer for sale in Ohio; that if the respondent 'be permitted to commit the threatened wrongs the same will, as complainants are informed and believe, damage complainants to the extent of more than $100,000, an amount largely in excess of respondent's ability to respond in judgment'; and that the statute of Ohio providing against the adulteration of food 'construed as respondent claims it should be, is in conflict with the fourteenth amendment to the Constitution of the United States and void.'

"And they pray that the respondent be perpetually enjoined." * * *

"The respondent resists the application upon the ground that the bill does not state facts sufficient to entitle the complainants to the relief prayed for.

"It is not alleged that the Ohio statute providing against the adulteration of food is in conflict with the fourteenth amendment to the Constitution of the United States, but the suggestion is that if construed as the respondent claims it should be, it will be in conflict with that amendment. * * *

"Now, the court is asked to hear evidence and determine this issue, and if it is found in favor of the complainants, to enjoin the dairy and food commissioner of Ohio from prosecuting any one who may manufacture, sell or offer to sell Ariosa in Ohio. * * *

"* * * It is a case where the Court is asked to restrain and prevent criminal prosecutions until it can first determine whether they should be instituted or not. * * *

"The bill will, therefore, be dismissed."

On appeal to the Circuit Court of Appeals, that court sustained the judgment of dismissal, and filed an opinion, from which the following is quoted (Rec., p. 83):

"The matter to be reviewed is the sufficiency of the bill and amendment to warrant the in-

tervention of a court of equity to restrain the defendant as prayed.

"An analysis of the bill shows the claim to be that respondent, the dairy and food commissioner of the State of Ohio, is proceeding upon an alleged false and erroneous construction of the statutes of Ohio to prosecute persons in Ohio dealing in the complainant's product known as Ariosa, and in giving out the statement that this product is sold in violation of the laws of the State. * * * It appears that the coffee of the complainant is coated, after roasting, with a compound of sugar and eggs for the purpose, as alleged in the bill, of retaining the full strength of the coffee, 'preventing the absorption of any injurious or noxious gases or flavors, and settling the same when prepared for consumption,' thus bringing Ariosa within the terms of the Ohio law, which provides that the act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, 'if each and every article sold or offered for sale be distinctly labeled as a mixture or compound with the name and per cent. of each ingredient therein, and are not injurious to health.' It is claimed that, notwithstanding Ariosa is thus labeled with a statement of the elements of the compound and is not injurious to health, the food commissioner is threatening proceedings, and is claiming that the same is within the prohibition of the sixth clause of the statute above quoted, making it an offense to coat an article of food, whereby damage or inferiority is concealed, and the same made to appear better or of greater value than it really is. It is urged that this statute 'construed as respondent claims it should be,' is in conflict with the fourteenth amendment of the Constitution, as it deprives the complainants of their property by prohibiting them from selling it in Ohio and dealers from selling the same in that State, notwithstanding the same are ordinary articles of food and not injurious to health, and will destroy the market value of the product, and deny to the complainants within the jurisdiction of Ohio the equal protection of the laws. * * * This alleged wrong construction, when analyzed, amounts

to this: The complainants claim that their compound is not within the terms of the statute, the food commissioner wrongfully claims that it is. Upon this branch of the case the question is: May a court of equity entertain a bill to inquire into this matter, and if it finds that the complainant is right in its contention enjoin the food commissioner from instituting proceedings under the laws of Ohio? * * *

* * * "It seems clear that this action cannot be maintained consistently with the eleventh amendment to the Constitution, withholding the judicial power of the United States from suits in law or equity, commenced or prosecuted against one of the United States by the citizens of another State, or citizens or subjects of any foreign State. * * * This is virtually to enjoin the State from proceeding through its duly qualified and acting officers. If the food commissioner may be enjoined from instituting such prosecutions, why may not the prosecuting attorney or any officer of the State charged with the execution of the criminal laws of the State? While the State may not be sued, if the bill can be sustained against its officers it is as effectually prevented from proceeding to enforce its laws as it would be by an action directly against the State.

"We are now dealing with an officer of a State proceeding under a valid law of the State, and whose error lies in wrongfully construing the statute so as to include the complainants' product. To entertain the bill in this aspect would be to subvert the administration of the criminal law and deny the right of trial by jury by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found guilty. * * * Every citizen must submit to such accusations if lawfully made, looking to the vindication of an acquittal and such remedies as the law affords for the recovery of damages. * * *

"It is further claimed that the act is unconstitutional as an interference with the right of Congress to regulate interstate commerce, and we are cited to Schollenberger *v.* Penn-

sylvania, 171 U. S., 1, in which a law of that State was held invalid to the extent that it prohibited the introduction of oleomargarine into the State from another State in original packages. The case was distinguished from the prior case of Plumley *v.* Massachusetts, 155 U. S., 461, in which the Supreme Court upheld a statute punishing the sale of oleomargarine when colored in imitation of butter. In other words, the Supreme Court held it to be within the power of the State to require an article of food to be sold for what it really is, and to protect the public from imposition in buying one article of food in the belief that it is another, but beyond the power of the State to prohibit the introduction and sale in original packages of a pure article sold upon its merits.

"As we read the Ohio statute it does not undertake to prohibit the introduction and sale of a pure article of food, sold for what it really is, but the coloring, coating or polishing of an article whereby damage or inferiority is concealed; the act providing in this connection that it shall not apply to mixtures or compounds recognized as ordinary articles of food, if every package sold or offered for sale be distinctly labeled as a mixture or compound, with the name and per cent. of each ingredient therein, and is not injurious to health. * * *

"But it is argued that coffee treated so as to make Ariosa is a pure article of food, and a compound labeled as required by the statute. Again the act is argued to be unconstitutional because of the construction put upon it by the food commissioner, and this 'construction' is his contention that Ariosa is coffee so coated as to conceal damage or inferiority, and that it is not a compound or mixture within the meaning of the statute. These are the very questions that the statute vests in the discretion of the commissioner as a preliminary matter in determining to institute prosecutions in the enforcement of the law which he is charged to execute, leaving the guilt or innocence of the party charged to be decided by the proper tribunals when prosecutions are instituted under the law. The constitutionality of the act is to be

determined by its language and purpose and not by the alleged wrongful institution of prosecutions thereunder against those guiltless of a violation of its provisions.

"Nor do we think that there is ground for injunction in the allegations of the bill that the food commissioner is publishing the fact that the product of the complainants is within the prohibition of the law. If this publication is made to those dealing in the article it would be within the duty of the commissioner, in advising of contemplated prosecutions; if such publications are libelous the law affords other means of redress.

"The fact that complainants' product is widely sold in Ohio, and many persons may be subject to prosecution, does not enlarge the jurisdiction of a court of equity to interfere by injunction to control prosecution for alleged violation of the laws of the State.

"We think this case comes within the principles settled by the Supreme Court in the cases above cited, and the Circuit Court did not err in dismissing the bill."

II.

Specification of errors relied upon.

It is submitted that the decree of the Circuit Court herein—as affirmed by the decree of the Circuit Court of Appeals from which this appeal is taken—was erroneous in that it ordered, adjudged and decreed that the bill of complaint herein and amendment thereto be dismissed; and in that it ordered, adjudged and decreed that defendant go without day; and in that it ordered, adjudged and decreed that defendant recover his costs herein; and in each of such particulars, so ordered, adjudicated and decreed.

In especial it is urged that the Circuit Court of Appeals erred:

1. In holding that this suit was, in effect, against the State of Ohio; hence one which under the

Eleventh Amendment of the Constitution of the United States, the Federal courts are without jurisdiction to entertain.

2. In holding that the statute of the State of Ohio in complainants' bill set forth (Sec. 4200–'6, R. S.) is constitutional and valid.

3. In holding that the Circuit Court was without jurisdiction to restrain the respondent.

4. In refusing to hold that the statute of the State of Ohio, set forth in complainants' bill (R. S., 4200–'6), as construed and threatened to be enforced by respondent, was unconstitutional and in conflict with the Fourteenth Amendment to the Constitution of the United States; and also unconstitutional as an interference with interstate commerce.

5. In refusing to find that Ariosa, being a mixture or compound, not injurious to health, and recognized as an ordinary article of food, *is within the exception*, and not within the prohibition, of the statute, and, therefore, not an adulteration in fact or in law.

6. In refusing to find that the Circuit Court had jurisdiction to restrain the respondent from stating or charging—

That Ariosa is adulterated; or

That complainants' process of coating and glazing set forth in the bill, is in violation of the statute of the State of Ohio, set forth in the bill (R. S., 4200–'6); or

That the importation into Ohio of said Ariosa, or the selling of or offering for sale the same, constitutes a violation of such statute; or

That any dealer possessing, offering for sale, or selling Ariosa glazed, as set forth in the bill, is in the possession of, offering for

sale, or selling an adulterated food product within the meaning of the statute of the State of Ohio (R. S., 4200-'6)

7. In refusing to find that the Circuit Court had jurisdiction to restrain the respondent from menacing or threatening any dealer in Ariosa, so glazed, with prosecution for having in possession, offering for sale, or selling, such Ariosa.

III.

BRIEF OF THE ARGUMENT.

No answer having been filed, the judgment of dismissal should be reversed, provided the complaint states facts sufficient, in any view of the case, to constitute a cause of action.

The only questions material here are, therefore:

First.—Have the Circuit Courts of the United States jurisdiction to entertain suits for such relief as is here demanded?

Second.—Does the bill set forth such a cause of action as to justify the intervention of a court having jurisdiction?

POINTS.

FIRST.—The Court had jurisdiction to entertain this suit and give the relief asked.

(1.) *Section 720 of the U. S. Revised Statutes has no application here.*

For when the bill herein was filed there had not been commenced any of the prosecutions threatened.

The point is too well settled in our favor to require or excuse argument. The precedents are well summed up in the following quotation from the opinion of the Court in *Rhodes Co.* v. *New Hampshire*, 70 Fed. Rep., 721:

> (723.) "This section (720) does not apply to proceedings, either criminal or civil, which have not in fact been commenced, but which are threatened by State officials. Mr. Justice Bradley in *Live-Stock Dealers' & Butchers' Assn* vs. *Crescent City Live Stock Landing & Slaughterhouse Co.*, 1 Abb. (U. S.), 388, 404, 407, Fed Cas. No. 8, 408, and Mr. Justice Blatchford in *Fisk* vs. *Railroad Co.*, 10 Blatchf., 518, Fed. Cas. No. 4, 830. A like distinction seems also to have been made by Judge Pardee in *Louisiana* vs. *Lagarde*, 60 Fed., 186, 193, and by Judge Sawyer in *Yick Wo* vs. *Crowley*, 26 Fed., 207. Therefore, if we had only this statutory provision to consider, we might find no difficulty in going to an injunction against criminal proceedings threatened, but not commenced when this bill was filed."

(2.) *This suit is not against the State of Ohio within the intendment of the Eleventh Amendment to the Constitution of the United States.*

> See *Scott* vs. *Donald*, *165 U. S. 58*, (*1897*).
>
> Also *Tindal* vs. *Wesley*, 167 U. S., 204, (1897).

—and the following later cases:

In *Western Union Tel. Co.* vs. *Myatt et al.*, 98 Fed. Rep., 335 (1899), the complainant, sued as a corporation and citizen of New York, to restrain enforcement against its officers and agents in Kansas by the Kansas State "Court of Visitation" of a statute, constituting refusal to comply with such Court's order, a misdemeanor, punishable by fine or imprisonment. And the Court said (p. 355):

> "In *Railway Co.* vs. *Dey* (*C. C.*), 35 Fed., 866-871, it was contended that the suit was

against the State, and, therefore, within the inhibition of the Eleventh Amendment to the Constitution. Upon this point Mr. Justice Brewer, then Circuit Judge, said: 'The defendants claim that they are simply attempting to carry into effect the mandates of the State as expressed in one of its laws; but if that law be unconstitutional it is no law, and they have no authority for their actions. This proceeding is a judicial inquiry to see whether they have authority for their actions; whether the law upon which they rely is valid and constitutional, *or sufficient to justify the actions which they are taking.*' * * * It is also contended by the defendants that this suit cannot be maintained because it is, in effect, an action against the State of Kansas, and, therefore, within the provisions of the Eleventh Amendment to the Federal Constitution; also that it is an effort to determine the constitutionality of a State enactment by the injunctive process of a Federal Court. In support of these contentions the case of *Fitts* vs. *McGhee*, 172 U S., 516, 19 Sup. Co., 269, is principally relied on. * * *

(p. 357): It seems to me to be clear that the doctrine announced in *Smyth* vs. *Ames*, and the preceding cases to the same effect was not modified by the decision in *Fitts* vs. *McGhee*, and it *is also clear that the case at bar is not a suit against the State of Kansas, within the meaning of the Eleventh Amendment to the Constitution.* It will be noticed that in the case at bar the defendants, * * * are specially charged with the enforcement of the State enactments under consideration, and that they are not otherwise general officers of the State, or charged with the enforcement of all laws generally."

" A suit to enjoin the officers of a State from enforcing an unconstitutional statute which subjects the complainant to a seizure of his property, and the closing of his place of business, for his failure to pay a license imposed by such statute, *is not an action against the State, within the meaning of the Eleventh Amendment to the Constitution, and is one*

of which a Federal Court of Equity has jurisdiction."

Also *Union Pac. R. Co.* v. *Alexander*, *113 Fed. Rep., 347* (1901).
Smyth v. *Ames*, *169 U. S., 466*, and
Prout v. *Starr*, *188 U. S., 537*,

especially the last named, where the Court says (p. 542):

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the several States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States (etc., etc.), all of which provisions existed before the adoption of the Eleventh Amendment, which still exists, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens by the passage of State laws disregarding these Constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry, whether the salutary provisions of the Fourteenth Amendment have been disregarded by State enactments."

And on both (1) and (2) above at once see:

Central Trust Co. vs. *Citizen's St. Ry. Co.*, 80 Fed. Rep., 218 (1897), (where on application, which, as the reported case shows, was advised and made by such conservative and capable counsel as Benjamin Harrison and W. H. H. Miller) in a case where criminal prosecutions were threatened by State authorities, under color of an invalid statute, for the purpose of compelling complainants to relinquish a property right, the Court ruled that the remedy in chancery was available, and that a preliminary injunction might properly issue, the following being

quoted from the opinion of Showalter, Circuit Judge (p. 225):

> "It is also contended that this suit cannot be maintained because the State is, in effect, a party defendant, and under the eleventh amendment to the National Constitution a State cannot be sued; and, further, that Section 720 of the Revised Statutes of the United States inhibits the relief prayed for in this bill as against defendants Wiltsie and the City of Indianapolis. But under the ruling of the Supreme Court of the United States in Pennoyer *v.* McConnaughty, 140 U. S., 1, 11 Sup. Ct., 699, and Reagan *v.* Trust Co., *supra*, this is not a suit against the State of Indiana, within the sense of the eleventh amendment, nor does it fall within the terms of Section 720. It is ordered that the injunction issue as prayed."

Before this Court, in this cause, can appear and be recognized as defendant only Joseph E. Blackburn, a natural person, whom complainants (also natural persons) ask to be enjoined from doing certain acts; each of which is of such a nature, that any citizen or other person in Ohio could do it; which respondent threatens, and which are alleged to be neither within his official capacity nor sanctioned by the statute under color of which he threatens to do what complainant asks the Court to forbid.

No complaint is made that the State of Ohio threatens to do, or can do any act, or that within his duties any official of that State, as such, can do it. On the contrary, the cause of action here consists of what -circumstances (including the Ohio statute quoted) being as they are -Joseph E. Blackburn, a citizen of Ohio, threatens to do.

Like any other citizen, he is entitled to such defense, as circumstances, including the Ohio statute, may furnish. If he pleads the statute, or if, as is the case here, the bill states its terms, and that the defendant falsely claims they justify his

statements, charges and threats complained of, then the Court must decide whether in fact such statute does constitute a defense for the acts complained of.

If it either (1) does not in fact do so, or (2)—if so construed as to do so—it is unconstitutional; then respondent's defense, based thereon, fails, and complainants are entitled to an injunction just as if no such statute existed. The construction and validity of the statute, and the construction and scope of the Constitution of the United States are thus at issue; but this issue is exclusively between these complainants and Joseph E. Blackburn.

As to criminal proceedings, it is not claimed or suggested that Blackburn is a district attorney or a committing magistrate, or that the Dairy and Food Commissioner can institute prosecutions in any other manner than that open to any other citizen, viz , by making such charge that the law has been violated as to set in motion the criminal procedure of the State.

Respondent's counsel seems entirely to misapprehend our position. Complainants here have no intent or wish to interfere with the normal enforcement of the criminal laws of the State of Ohio. They do not object to any other citizen of Ohio making any charge, however unfounded—whether such as respondent here threatens, or others—or instituting any number of prosecutions against any number of dealers, in respect of their sale or offering for sale of Ariosa. Indeed, complainants do not even object to defendant making such charges or instituting such prosecutions, if on other grounds than those, without foundation in fact or law, which they have set up in their bill. Their objection is not to *bona fide* criminal prosecutions, as such, or generally to the enforcement against any person or persons, of the law of Ohio—on whatever mistake of fact, however misconstrued, or however harshly administered.

On the contrary, their complaint is this: Setting

out facts, the conclusion from which is irresistible that the respondent is using threats and proposes to institute a multiplicity of unfounded prosecutions, as a factor of a scheme to attack complainants' business and destroy their property, it asks that this scheme, including this feature, be enjoined.

It is no answer to say that any one of thousands of others of citizens of Ohio can institute similar proceedings, that hundreds of officials, district attorneys, justices of the peace and others, may do so, or that it is therefore frivolous for complainants to ask that Blackburn alone be enjoined.

Complainants have no cause to fear acts by other citizens or officials of Ohio; no reason to impeach their motives; no ground upon which to ask that they be restrained. But they do have cause to object to the statements, they do impeach the motives, and they do fear the threats of respondent. By their bill they set forth the grounds upon which they are entitled to have him restrained from this wanton attack, not upon themselves (for he has not threatened to sue *them*), but *upon their business* as merchants—through prosecutions against others, in which only by chance can they secure any opportunity to defend their property. They ask that he shall be restrained, not because he is an official of the State of Ohio—though the repute thereby acquired makes his statements and charges more damaging and his threats more dangerous; not because, just as any other citizen of Ohio, he may institute a prosecution under the laws of that State against any one as to whom he shall make an appropriate charge; but because, as an individual, Joseph E. Blackburn, in his wanton attack on the property rights of complainants, has threatened, among other factors to that end, to institute unfounded prosecutions, against which the complainants cannot effectively defend themselves except by anticipation (as by this suit); and by the threat and

pendency of which they would be meanwhile irretrievably damaged.

In short our case is similar to but much stronger than that in *Louisiana* v. *Lagarde*, 60 Fed. Rep., 186 (1894), where, on objection by the State Commissioners of Agriculture that the injunction asked against them would be futile unless the district attorneys and other local officials were also enjoined, the Court said (p. 192):

Pardee, Circuit Judge:

> "It is not at all probable that the district attorneys of the State will constitute themselves inspectors of fertilizers, or Agents of the Board of Agriculture, and in that way attempt to harass complainants, while it is more than probable that any and all proceedings, civil or criminal, instituted against the complainants for non-compliance with the Act in question, will be instigated, instituted, and prosecuted only through the Board of Agriculture, its members, officers, agents, and attorneys. *There can be no doubt about the power of the Courts to issue an injunction running to those persons, restraining their action as prayed for in the bill; and * * * such injunction may issue, but not to interfere with the prosecution of any suits, civil or criminal, commenced before the filing of this bill.*"

Again:

The Circuit Court of Appeals was mistaken in its assumption (Rec., p. 88):

> "These" (questions as to proper construction of the Ohio statute) "are the very questions that the statute vests in the discretion of the Commissioner, as a preliminary matter in determining to institute prosecutions in the enforcement of the law which he is charged to execute."

For, not merely would a statute giving any person—official or private—discretion as to the construction of a law be obviously void; but in fact the Ohio

statute neither attempts this nor imposes upon the Ohio Dairy and Food Commissioner any such duty as raises this question.

The nearest approaches thereto are in the clauses:

> "He" (the Dairy and Food Commissioner) "shall be charged with the enforcement of all "laws against fraud and adulteration or impu- "rities in foods, drinks or drugs, and unlawful "labelling in the State of Ohio." * * *
>
> The Dairy and Food Commissioner is also authorized "to prosecute or cause to be "prosecuted any person * * * engaged in "the manufacture or sale of any adulterated "article of food or drink * * * in violation "of, or contrary to, the laws of the State of "Ohio."
>
> Laws of O. (Bates' Ed.), Title III., Ch. 18, Secs. 409–7 and 8.

The only duties specifically imposed upon the Commissioner by the statute are those of inspection, and

> "The" (Dairy and Food) "Commissioner "shall make an annual report to the Governor, "on or before the 15th day of November of "each year, containing itemized statements of "all receipts and disbursements, attorneys' "fees in each specified suit brought in this "department, and all persons employed by "him, together with such statistics and other "matter as he may regard or value" –

which well illustrates how *aliunde* here is the suggestion of the Circuit Court of Appeals.

For example: If it were attempted to enjoin the Commissioner from including in his report certain statistics that he claimed to regard of value, the question might arise how far the express direction of the statute would make such matter privileged. But when (as is the case with reference to all other matters than his duty to inspect and to make this annual report to the Governor) the statute merely directs him to enforce the law, it certainly cannot give, or even infer, any

other immunity than that to which every citizen is always entitled—protection against legal attack for doing whatever valid law requires or authorizes.

As to the statements, letters and circulars complained of, the bill shows them to have been given out in February, 1901; they are not suggested to have had any connection with any such report; and on their face they are ephemeral and not a part of any such document. In short, the case here is the simplest possible example of that referred to by the opinion of the Court in *R. R. Co.* v. *Dey, 35 Fed. Rep., 866 (871).*

> "This proceeding is a judicial inquiry to see whether they" (State officials) "have authority for their actions; whether the law on which they rely is valid and constitutional, *or sufficient to justify the action which they are taking.*"

—And the case on this point is as nearly as may be that passed upon in *Union Pac. R. R. Co.* v. *Alexander, 113 Fed. Rep., 347* (1901)—of which see head note and opinion.

> (Court, at p. 350.) "In this case no act of political administration is challenged, no contract of the state is involved, and no judgment can be rendered which affects it as a corporate entity. It is affected and interested only as it is interested and affected by the welfare of its citizens. The legislation involved is governmental in its nature, not contractual. No obligation that the state has entered into, no contract or promise that it has made is questioned. *The bill rests solely upon the proposition that the property rights of the complainants are involved by the threatened actions of the defendants, and this is a judicial inquiry to see whether they have authority for their actions,—whether the law upon which they rely is valid and constitutional, or* **sufficient to justify the action which they are taking.**

So far as concerns any claim that—in instituting prosecutions, issuing volunteer statements or circulars as to complainant's property, &c., &c.—the Dairy and Food Commissioner of Ohio is a judicial officer whose discretion is protected against intervention by Federal courts, the latest authorities are explicit to the effect that, even if the State had expressly directed the acts complained of, and had formally clothed the Commissioner with judicial power, he (such Commissioner) would have been held not entitled to protection in the mistaken exercise of that discretion, but would be considered as a ministerial officer, subject to the equity jurisdiction of the Federal courts. See:

Louisville & N. R. Co. v. *Brown et al., 123 Fed. Rep., 946.*

Pardee, Circuit Judge:

(947) "The bill, which is skillfully drawn, sets forth that the Railroad Commission of the State of Florida has ordered a reduction in the prospective rates of carrying passengers on the complainants' railroads situated in the State of Florida, and has ordered complainant to observe said reduced rates under very severe pains and penalties imposed by the law of the State of Florida. The bill and exhibits submitted by the complainant on this hearing decidedly support the contention of the complainant, and show a case wherein, on general principles, the complainant is entitled to relief. The Court has general jurisdiction of the case by reason of the diverse citizenship of the parties and from the constitutional questions involved; and it has jurisdiction in equity by reason of the inadequacy of all remedies at law and to prevent a multiplicity of suits, which would result if the complainant should ignore the alleged illegal orders of the commission, and attempt to stand upon its alleged rights in the premises.

"In the demurrer and answer to the bill, the latter being taken as an affidavit, many objections to the right of the complainant to an injunction are urged, and in the briefs they are

elaborated with great skill and ingenuity. The main contention of the respondents is that as the legislative act which creates and defines the powers and authority of the railroad commission vests in the said commission 'judicial powers to do or enforce or perform any function, duty or power conferred upon them by the act to the exercise of which judicial power is necessary,' the said commission, in performing the various powers and duties vested in the commissioners by the act, is a State court, within the meaning of section 720 of the Revised Statutes of the United States (U. S. Comp. St., 1901, p. 581), which prohibits any court of the United States from issuing an injunction restraining proceedings in any court of a State. An inspection of the act of the Legislature of the State of Florida creating the railroad commission shows that, as is usual in such cases, the commission is vested with executive, legislative, and *quasi* judicial powers, but does not show that the commission is to any degree created and established as a court for the final adjudication and determination of the rights of individuals or the rights of property. Whatever may be the act, order, or proceeding of the commission, whether of an executive, legislative, or *quasi* judicial character, the commission's findings are only *prima facie* determined, and can only be enforced in the courts; and in every instance the rights of individuals or the rights of property concerned can be re-examined and determined in the regular course. But be that as it may, it is clear from the act as a whole that the judicial powers conferred by the act are *quoad* judicial acts to be performed by the commission, and were not intended to extend to the performance of any act of the legislative powers conferred upon the commission.

"It seems to be well settled that the power to fix the future rates is legislative, and not judicial (Interstate Commerce Commission *v.* Cincinnati, N. O. & T. &. P. R. R. Co., 167 U. S., 499; 17 Sup. Ct., 896; 42 L. Ed., 243); and therefore it may be assumed as beyond question that the Florida railroad commission, in regulating and reducing the future rates of passen-

ger fares to be charged and collected by the Louisville & Nashville Railroad Company on its lines in the State of Florida, acted in a legislative capacity, and that with regard to enforcing the said reduction the commission is given no judicial powers, being limited, under the statute creating the commission, to the institution of proceedings, or the direction of the same, in the regular courts. For an interesting discussion of these matters, see Western Union Telegraph Co. *v.* Myatt (C. C.) 98 Fed., 341, 342, and State *ex rel. v.* Johnson (Kan. Sup.), 60 Pac., 1060; 49 L. R. A., 662."

(3.) *In defense of* ***property*** *rights, and when justified by equitable considerations, courts of equity may enjoin criminal prosecution.*

For more than a hundred years it has been perfectly well established that in proper cases equity would restrain a plaintiff in its forum from proceeding at the same time in criminal courts against another party to the proceeding in equity. And for more than fifty years injunctions have been regularly issued against criminal acts—and criminal prosecutions—*whenever such injunction was necessary to protect property rights.*

In *Turner* vs. *Turner*, Jurist, 15, Part I., 218 (1851), agents of a receiver, acting under leave of Court, took forcible possession of a house occupied by servants of the defendant, who preferred a bill indictment against the solicitor, builder and workmen, who had forcibly entered. Held, that the Court would enjoin proceeding on indictment.

Lord Cranworth, *V. C.*: "I shall certainly make an order restraining the defendant from prosecuting the indictment. The distinction is very intelligible, this Court has no jurisdiction over an indictment in general, as over a mere civil procedure, but this is merely with respect to its own jurisdiction."

"When a petition has been presented for winding up a company, all criminal proceed-

ings against the company may be restrained by injunction" (*re* Briton, Medical and General, 32 Ch. Div., 563).

Snell, Principles of Equity (12th Ed.), 648 (Lond., 1898).

"If, however, the act concerning which an "arrest or criminal procedure is threatened "affects civil *property and its enjoyment, then* "*in protecting the property rights, equity may* "*properly enjoin the criminal prosecution.* "But in such case its interference is founded "solely upon the ground of injury to property "and the necessity of preserving property "rights."

High on Injunction (Ed. 1890), Sec. 68.

The authority of those assertions of the scope of equity relief and declaration of principle on which it depended, has never been questioned, but, on the contrary, confirmed by unbroken line of precedent.

Directly in support of the general power of a court of equity *to restrain criminal prosecutions* in cases much less urgent than the present one, are—

Lord Auckland vs *Westminster Local Board of Works*, L. R. Ch. App. Cas. VII., 597 (1872).

(600) "* * * The District Board having threatened to put their powers in force against the plaintiff if he proceeded to build beyond the line laid down by the architect of the Metropolitan Board, the plaintiff filed the present bill, in which he prayed that the order of the superintending architect might be declared to be invalid, *and that the District Board might be restrained* from interfering with the erection of the proposed buildings by the plaintiff, and *from recovering any penalties in respect thereof.*"

"*I am of opinion that the order of the Vice-Chancellor granting an injunction is perfectly right.*

"The District Board threaten that, if Lord

> Auckland should erect stables on this land, they will pull them down. It is true that they must first go before a magistrate. If they do so he will probably tell them that he has no jurisdiction, for it seems to me perfectly clear that he has no jurisdiction under this section. But I think Lord Auckland is entitled to say, 'I will not wait to see whether a magistrate will decide rightly or wrongly as to his jurisdiction in this case; I will not go before a magistrate at all, but I will go into the Court of Chancery for an injunction to restrain you from pulling down my stables in a case where you have no power to pull them down.'"
>
> *Idem*, 670 (Sir A. Mellish, *L. J.*).

This case has not merely remained unshaken, but established by the very cases which have been most frequently misquoted as authorities for a contrary rule.

In America among the earlier reported cases is *Atlanta* vs. *Gate City Gas Light Co.*, 71 Ga., 106 (1883). In this case, under an *erroneous opinion of their rights*, the Mayor and City Engineer of Atlanta threatened to arrest the gas company's employees, under claim that they violated a city ordinance against obstructing streets without a permit, in case they proceeded in the usual and proper way to put down mains in streets, a permit having been refused.

An injunction was prayed for restraining the City and its officials from interfering with the Gas Company's rights *by arrest or otherwise*.

In delivering its opinion, affirming the judgment of the Court below granting an injunction, the Court said:

> "If the charge be of a criminal nature or offense against the public, and does not touch the enjoyment of property, then a court of equity should not interpose by injunction. On the other hand, when it is manifest, as in this case, that a prosecution and arrest is threatened for an alleged viola-

> tion of city ordinances, for the sole purpose of preventing the exercise of civil rights, directly conferred by law, injunction is a proper remedy to prevent injury to the party thus menaced. * * * To arrest the employees of complainants for laying down pipes and erecting posts along the streets of Atlanta, we are satisfied would be a misapplication of the city ordinances, wisely established to prevent wanton and unlawful injury to such streets, &c., and the obstruction of the same" *Injunction order affirmed.*

In *Port of Mobile* vs. *L. & N. R. R. Co.*, 84 Ala., 115 (1887), a bill was filed by the L. & N. Railroad Company *vs.* The Port of Mobile, to enjoin the enforcement of an ordinance of that municipality which declared it unlawful for any person or corporation to load or unload cars in the public streets of the city, under a penalty of not less than $25 for each and every violation.

Plaintiff alleged a vested franchise to load and unload freight on Commerce street, and use thereunder for forty years; that the ordinance in question was void; that defendants' employees were threatened with arrest; also multiplicity of suits; irreparable damage, inadequacy of law, &c.

The Court found as alleged, and added—

> (125) "*The suggestion that the Court, under the peculiar circumstances of this case, must abdicate its jurisdiction because of the fact that it is dealing with an ordinance of a municipal corporation of a quasi-criminal character, the violation of which is made an offense, does not strike me favorably.* The power to prevent irreparable injury flowing from the deficiency and injustice of the more technical rules of the common law, may be said to be the very life of equity jurisdiction. The Court must, therefore, be jealous of its power, notwithstanding it may also be cautious in its exercise." Injunction granted.

Above approved and followed in a similar case, *Birmingham* vs. *Alabama, G. S. R. R. Co.*, 98 Ala.,

134, and conceded to be authority (though distinguished) in *N. C. & St. L. R. R.* vs. *Attala*, 118 Ala, 362 (license fee case), where the Court held equities not sufficiently strong.

See also *Dinsmore* v. *N. Y. Board of Police, 12 Abb. N. C., 436* (N. Y., 1882), where it was ruled that a court of equity has power to grant an injunction in an action against the Board of Police of the City of New York, a corporation, to restrain them from interfering with the necessary operations and business of an express company engaged in the business of interstate commerce, even though a law of the State of New York prohibits any such operations and business on Sunday, and such interference was pursuant to such law.

And *Manhattan Iron Works Co.* v. *French, 12 Abb. N. C., 446* (N. Y., 1882) which holds that a court of equity has power in aproper action to enjoin the police authority of the State from interfering with the business and property of a manufacturer engaged in continuing the business of manufacturing on Sunday, even though such interference was under color of a statute of New York, if it appear that such manufacturing business cannot be discontinued on Sunday without destruction of property, or irreparable loss and damage thereto.

> (Court at p. 450): "The only question raised by the corporation counsel in this case is the power of this court to enjoin the defendants. He contends that the proper course for plaintiff is to submit to the arrest of its servants, defend them before a magistrate, and if convicted, sue out a writ of *habeas corpus;* and he further contends that this court has no jurisdiction. If this court has no equity jurisdiction in this case and this injunction is consequently denied, the presumption is that the defendants will execute their threats. Let us contemplate a possible result in that event. The men are arrested and held by the magistrate, on *habeas*

> *corpus* the prisoners are remanded, on review the convictions are affirmed, and on writ of error to the court of appeals they are reversed. In the meantime the furnace has chilled, that is the molten mass, for want of fuel, has become solidified so that the iron, the flux, the fire brick are all bound together in one indivisible mass. This is a matter so serious that it costs $40,000 to remedy. But this is not all; the furnaces have to stand idle during the pending of the appeal, the skilled labor employed has been scattered, and the contracts unfulfilled that have been previously made and for which heavy damages have been incurred. In a word, the plaintiff has been ruined. For all this it has no redress. The defendants as public officers acting under the law assume no responsibility for their conduct. And yet the courts cannot interfere is the assertion of the learned corporation counsel. If this is true, it is a blot upon the administration of justice. If it is true, however, the courts must so declare and leave the redress to the Legislature.
>
> * * * * * *

After distinguishing cases cited by defendants Court concludes (p. 451):

> "These cases are clearly distinguishable from the case at bar. They are all against the person. Injunction never lies to restrain the police authorities from arrests for crimes charged against persons, as is shown by the last two cases above cited, nor does it lie against the method of doing a particular business, as in the case first above cited. Here, however, the proposed action of the police is *against the prosecution of this business*, no matter in what form it may be done."

and sustained the injunction.

(4.) ***This jurisdiction has been frequently exercised by the Federal courts in restraint of State officials (as well as others) from both civil and criminal prosecutions in State (as well as other) courts.***

The following—

Central Trust Co. v. *Citizens' S. R. Co., 80 Fed. Rep., 218;*
Western Union Tel. Co. v. *Myall, 98 Fed. Rep., 335;*
Minneapolis Brewing Co. v. *McGillivray, 104 Fed. Rep., 258;*
U. P. R. R. Co. v. *Alexander, 113 Fed. Rep., 347;*
L. & N. R. Co. v. *Brown, 123 Fed. Rep., 946;*
Tindal v. *Wesley, 167 U. S., 204;*

all *supra*, are authority on this point as well. In addition we note:

In *State of Louisiana* vs. *Lagarde et al.*, 60 Fed. Rep., 186 (1894), an injunction was asked on cross-bill filed by the defendants, soliciting agents of The Thompson & Edwards Fertilizing Company, a corporation of Illinois, manufacturing fertilizers outside of Louisiana, but importing them into that State in original packages, in response to orders from parties there, against unjustifiable interference by the Louisiana Commissioner of Agriculture, and his inspectors, by civil and criminal suits and prosecutions against dealers in such fertilizers within the State. In its opinion the Court said:

> (192.) " There is only one serious question as to the scope of the injunction that ought to be issued, and that is whether a Court of Equity can enjoin the law officers of the State from instituting and prosecuting criminal suits or proceedings under a void or unconstitutional law. * * * There is only one section of the Act in question that in any way calls for or requires the district attorneys of the State, as such, to institute criminal proceedings against the complainants, even if complainants' business should be construed as being within the Act; and that section relates to cases where complainants shall be charged with selling, or offering to sell, any package

of commercial fertilizer which has not been tagged as provided in the act. It is not at all probable that the district attorneys of the State will constitute themselves inspectors of fertilizers, or agents of the Board of Agriculture, and in that way attempt to harass complainants, while it is more than probable that any and all proceedings, civil or criminal, instituted against the complainants for noncompliance with the act in question, will be instigated, instituted and prosecuted only through the Board of Agriculture, its members, officers, agents and attorneys. *There can be no doubt about the power of the Court to issue an injunction running to those persons, restraining their action as prayed for in the bill; and * * * such injunction may issue, but not to interfere with the prosecution of any suits, civil or criminal, commenced before the filing of this bill.*"

In *Donald* vs. *Scott et al.*, 67 Fed. Rep, 854 (1895) (affirmed in this Court *sub nomine Scott* v. *Donald*, 165 U. S., 58).

Simonton, Circuit Judge:

(855.) "This is a bill against the defendants, the State constables of the State of South Carolina. The bill states: That the complainant is a citizen of the United States and of the State of South Carolina, and was the owner of certain packages of alcoholic liquor, to wit: One barrel of Rochester beer, made in the State of New York, and shipped to him by ocean and land routes to the city of Charleston, his place of residence, &c. * * * None of them contained any product of the State of South Carolina, but their contents were products of other states of the union. That each package was openly marked in his name. That upon the arrival of each of the same packages at Charleston, its destination, it was forcibly seized by the defendants, claiming to act as State Constables, and taken and carried away by them, under the pretense of authority of the Act of the General Assembly of South Carolina, approved Jan-

> uary 2, 1895, commonly known as the 'Dispensary Law.' * * *
>
> "That upon each seizure, and after demand and refusal, he brought his action for the unlawful trespass on his rights by the defendants; and that, notwithstanding this, they persist therein, and manifestly propose to drive him to a multiplicity of suits. That he has no adequate remedy at law for these repeated violations of his rights, as the defendants are notoriously insolvent and pecuniarily irresponsible He avers that so much of the dispensary law as is set up in justification of these acts of the defendants in preventing him from importing for his own use and consumption alcoholic liquors, the products of other states, into this state, violates the Interstate Commerce Law as established by the Constitution and laws of the United States, and is null and void."

—and granted the injunction asked.

In *Wong Wai* vs. *Williamson et al.*, 103 Fed-Rep., 1 (1900). in the Circuit Court, Northern District of California, Morrow, Circuit Judge, Hawley and De Haven, District Judges, unanimously held that a Federal court of equity might properly grant an injunction against the Board of Health of the City of San Francisco.

Quoting from the syllabus—

> "A court of equity may properly grant an injunction restraining health officers of the United States *or of a city* from imposing or enforcing unlawful restrictions upon the right of a complainant, and others for whom he sues, to travel or to leave the city in which they are, in the pursuit of their lawful business, where such right has a pecuniary value, and the enforcement of the restrictions complained of will result in irreparable loss and injury to the complainants."

In *Jew Ho* vs. *Williamson*, 103 Fed. Rep., 10 (1900), a similar case, the Court held—

MORROW, Circuit Judge:

(21.) "As I had occasion to say in the former case [*Wong Wai* vs. *Williamson* (C. C.), 103 Fed., 1], this Court will, of course, uphold any reasonable regulation that may be imposed for the purpose of protecting the people of the city from the invasion of epidemic disease. * * * But is the regulation in this case a reasonable one? Is it a proper regulation, directed to accomplish the purpose that appears to have been in view? That is a question for this Court to determine. * * *

(23.) So, upon that ground, the Court must hold that this quarantine is not a reasonable regulation to accomplish the purposes sought. It is not in harmony with the declared purpose of the Board of Health or of the Board of Supervisors."

"But there is still another feature of this case that has been called to the attention of the Court, and that is its discriminating character; that is to say, it is said that this quarantine discriminates against the Chinese population of this city (citing *Yick Wo* vs. *Hopkins*, 118 U. S., 356). 'Though the law itself be fair on its face and impartial in appearance, *yet, if it is applied and administered by public authority with an evil eye and an unequal hand*, so as practically to make unjust and illegal discriminations, between persons of similar circumstances, material to their rights, the denial of equal justice *is still within the prohibition of the Constitution.*'

(26) "It follows from the remarks that I have made that this quarantine cannot be continued, by reason of the fact that it is unreasonable, unjust and oppressive, and, therefore, contrary to the laws limiting the police powers of the state and municipality in such matters; and, second, that it is discriminating in its character, and is contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States."

And an injunction here was issued on application of complainant, Jew Ho, to prevent interference by the defendants, the Board of Health of the City of San Francisco, with his business as a grocer, etc., *restraining them from requiring complainant and others to submit to inoculation, or, in default of such submission, from imprisoning, restraining, or confining complainant and others*, and from interfering with or restraining complainant and others in exercise of their personal liberty, it being shown enforcement of the health regulation thus complained of would result in irreparable pecuniary loss and injury to complainants *in respect of their lawful business.*

On this point, see also *Central Trust Co.* v. *Citizens' St. R. Co.*, 80 Fed. Rep., 218 (1897), already cited on another point.

> (At p. 225, SHOWALTER, Circuit Judge.) "Counsel urge that this bill does not show a cause of action cognizable in chancery against Mr. Wiltsie, the District-Attorney, since its purpose is to restrain him from instituting criminal prosecutions under color of the amendment of 1897. But this complainant is seeking to protect a property right, and it seems to be law that when such prosecutions are threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, the remedy in chancery is available. Reagan *v.* Trust Co., 154 U. S., 362, 14 Sup. Ct., 1047, and Lottery Co. *v.* Fitzpatrick, 3 Woods, 222; Fed. Cas., No. 8,541, in each of which apprehended criminal prosecutions were enjoined, are to the point. Even in the case of Sawyer, 124 U. S., 200, 8 Sup. Ct., 482, cited by the Attorney-General, the rule as here stated is plainly recognized; nor do I find it disputed in any case."
>
> And see *Southern Exp. Co.* v. *Mayor, &c., of Ensley*, 116 Fed. Rep., 756 (1902).

JONES, District Judge (758). "The right of the express company to do interstate business at Ensley is the very marrow of the contention here. The company by its bill says to the city: You have no right to meddle with my business. We ask the protection of the court to carry on our business in spite of the city. The city by its demurrer says to the company: The city has power to regulate and tax your right to do business. If you do not pay for the right, you shall not carry on business at all. Any decree on the merits of necessity settles these irreconcilable claims as to the right to do business. Inevitably the decree must determine the validity of the express company's claim of unrestricted right to do interstate business at Ensley. If the express company has that right, the bill must be retained, and the city authorities enjoined. If it has no such right, the bill must be dismissed, and the city authorities allowed to have their way. The extent of the particular burden is of no moment so long as there is a denial of any power to interfere with the business at all. The right to do business lies at the root of the whole controversy, and accompanies every phase of the contention. What is the value of the right? What is the amount of injury which complainant may sustain from the meddling with it? The allegations of the bill are that the value of the express company's right to do interstate business at Ensley, and the injury done to the express company's business by the arrests of its agent, would exceed $2,000. Clearly the controversy involves a value or amount within the jurisdiction. Complainant is seeking to enforce a right which is worth more than $2,000 to it, and to prevent damage threatened to an amount in excess of $2,000. * * *

4. The necessities of this case do not require much discussion of the power of a court of equity to stay or enjoin criminal prosecutions. It is to be borne in mind that the power of the State, much less of its municipal authorities, cannot extend to regulating interstate commerce.

(At p. 761.) "5. The ordinance here in question is a palpable violation of the constitution.

If the municipal authorities who are engaged in enforcing this ordinance are otherwise amenable to preventive remedies of a court of equity, upon what principle of law or morals can they evade the jurisdiction, because to the usurpation of power in passing the ordinance is added the further defiance of the constitution, by declaring resistance to the ordinance a penal offense against society and punishing it accordingly? The fact that the city officers in making the arrests were themselves trespassers, and violators of the law of the land, using the physical power of the city to effect these arrests, can in no way affect the jurisdiction of this Court, if a case is otherwise made out which justifies injunctive relief against them (Osborn *v.* Bank, 9 Wheat., 738; 6 L. Ed., 204; Davis *v.* Gray, 16 Wall., 203, 21 L. Ed., 447; *In re* Debs, 158 U. S., 564; 15 Sup. Ct., 900; 39 L. Ed., 1092; City Council of Montgomery *v.* Louisville & N. R. Co., 84 Ala., 130; 4 South., 626; Port of Mobile *v.* Louisville & N. R. Co., 84 Ala., 116; 4 South., 106; 5 Am. St. Rep., 342).

Also *Wallace* v. *Ark. Cent. R. Co., 118 Fed. Rep., 422* (1902):

(423.) "Thayer, Circuit Judge. The record in this case discloses that the Arkansas Central Railroad Company, the appellee, filed a bill against Jeremiah G. Wallace, Felix M. Hanley, and Henry W. Wells, composing the Board of Railroad Commissioners of the State of Arkansas, whereby it prayed for an injunction restraining said Board of Railroad Commissioners from putting in force a certain freight tariff applicable to certain railroads in the State of Arkansas, which, by an order of the board, had been adopted and made effective as of August 2, 1900, and declared to supersede all other tariffs then in effect on said railroads. Besides, asking for an injunction restraining the commission from putting this tariff in force, the railroad company also asked for an injunction restraining the Commissioners from instituting any suits against the complainant for the recovery of any penalties under the laws of the State by virtue of the fact that the complainant

had not adopted and made such rates effective on its road as it was ordered to do."

"The decree of the lower court was clearly right under repeated decisions of the Supreme Court of the United States holding that a State law or regulation establishing rates for the transportation of persons or property, such as will not admit of the carrier earning such compensation as under all the circumstances of the case is just to it and the public, operates to deprive the company of its property without due process of law, and to deny to it the equal protection of the law, in violation of the fourteenth amendment to the Federal Constitution (Smyth *v.* Ames, 169 U. S., 466, 522, 523; 18 Sup. Ct., 418; 42 L. Ed., 819; Reagan *v.* Trust Co., 154 U. S., 362; 14 Sup. Ct., 1047; 38 L. Ed., 1014)."

(5.) *In late cases this (Supreme) Court has fully sustained such jurisdiction on every ground urged here.*

Smyth vs *Ames*, 169 U. S., 466 (1898).

In this case the Supreme Court of the United States affirmed a series of identical decrees of the United States Circuit Court for the District of Nebraska, perpetually enjoining certain railroad companies from making reduced rate schedules, as prescribed by a statute of Nebraska; and restraining the Nebraska State Board of Transportation from hearing or deciding any complaint against said companies under such Act; *or from instituting or prosecuting any action or proceeding for violation of said Act.*

By the injunction here sustained, the Nebraska State Board of Transportation, its members, and secretaries, were restrained

(477) "from instituting or prosecuting, or causing to be instituted or prosecuted any action or proceeding, civil *or criminal*, against either of said companies, &c., for any act or thing done, suffered, or omitted, which may be for-

bidden or commanded by said Act"; and *the Attorney-General of the State was also enjoined "from bringing, or causing to be brought, any proceeding* by way of injunction, mandamus, civil action or *indictment*, against said companies, or either of them," &c.

In the opinion, Justice Harlan says:

(478) "The present appeals were prosecuted by the defendants constituting the State Board of Transportation, as well as by the defendants who are secretaries of that board.

"* * * * It was contended that the plaintiffs had an adequate remedy at law, and that the Circuit Court of the United States, sitting in equity, was therefore without jurisdiction. * * *

(517.) "In these cases the plaintiffs, stockholders in the corporation named, ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which, in the federal system, distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute. The carrier is made liable, not only to individual persons for every act, matter, or thing prohibited by the statute, and for every omission to do any act, matter, or thing required to be done, but to a fine of from one thousand to fine thousand dollars for the first offense, from five thousand to ten thousand dollars for the second offense, from ten thousand to twenty thousand dollars for the third offense, and twenty-five thousand dollars for each subsequent offense. * * *

"Another question of a preliminary character must be here noticed. The answer of the officers of the State in each case insists that the real party in interest is the State, and that these suits are, in effect, suits against the State, of which the Circuit Court of the United States cannot take jurisdiction, consistently with the Eleventh Amendment of the Constitution of the

> United States. * * * But to prevent misapprehension, we add that within the meaning of the Eleventh Amendment of the Constitution, the suits are not against the State, but against certain individuals charged with the administration of a State enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment." (Cases cited.)

The Court thereupon proceeds, holding that the State Act in question is unconstitutional in that it would deprive the plaintiffs of their property without due process of law; would deny the plaintiffs the equal protection of law, and, *without dissent, affirms in toto the decree of injunction in each of the cases involved.*

It is true that in Smyth *v.* Ames the claim that Federal courts lack *jurisdiction* to enjoin criminal proceedings in a State was not specially argued and separately passed upon by this (Supreme) Court. This however, was done in *Prout* v. *Starr*, 188 U. S., 537. (At p. 542) Mr. Justice Shiras delivered the opinion of this Court. * * *

> "But by this appeal we are asked to declare that the Circuit Court had no jurisdiction, because it appears on the face of the bill that the complaint is essentially against the State of Nebraska, and is in contravention of the Eleventh Amendment of the Constitution of the United States.
>
> It is a sufficient answer to this contention that it was made, considered and determined in Smyth *v.* Ames. In the opinion in that case it was said:
>
> 'Within the meaning of the eleventh amendment of the Constitution, these suits are not against the State, but against certain individuals charged with the administration of a State en-

actment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them, as officers of a State, from enforcing an unconstitutional enactment, to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment (Pennoyer *v.* McConnaughty, 140 U. S., 1, 10; *in re* Tyler, 149 U. S., 164, 190; Scott *v.* Donald, 165 U. S., 58, 68; Tindal *v.* Wesley, 167 U. S., 204, 220.'

"The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, which forbid the States from entering into any treaty, alliance or confederation, from passing a bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States, or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which still exists, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of State laws disregarding these constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by State enactments."

(At p. 544.) "It is further argued by the appellant, as one of the grounds of his demurrer, that he was complained against in his official capacity as Attorney General of the State of Nebraska, and not in his individual capacity as a citizen thereof, and that the attorney-general of a State cannot be restrained by an injunc-

tion of a United States Court from enforcing the criminal laws of the State.

This, we think, is only another phase of the same question.

It is true that the defendant was included in the bill as the Attorney-General of the State, but that was because he was one of the board of transportation, which was directed to enforce the provisions of the act. The bill did not seek to interfere with the acts of the Attorney-General in prosecuting offenders against the valid criminal laws of the State, but its object was to prevent him from collecting penalties that had accrued under the provisions of a statute judicially determined to be void. The injunction must be so read and understood."

As applied to our case this decision would read:

"The bill does not seek to interfere with the acts of the Dairy and Food Commissioner in prosecuting offenders against the criminal laws of the State, but the object was to prevent him from instituting prosecutions under statutory construction by him, judicially determined to be erroneous," (as per *White* v. *Ohio* below.)

SECOND.—The bill sets forth causes of action justifying the relief asked.

(*1.*) *Defendants' circulars and threats of prosecution are in themselves cause of action.*

Among the allegations of the bill are:

"XI.—The respondent herein, Joseph E. Blackburn, dairy and food commissioner as aforesaid, without authority of law, and falsely and erroneously construing the provisions of said statutes above set forth, notwithstanding the fact that the process used in the manufacture of the said compound or mixture known as Ariosa is

not in violation of the said statute and that the said statute is not applicable to the premises, and that there is no law of the State of Ohio warranting his acts hereinafter set forth, and further notwithstanding the healthful character of said Ariosa, the benefits accruing to the consumers thereof by reason of the aforesaid process used in its manufacture, and the fact that the use of said process, its objects and effect, and the ingredients and formula thereof, are plainly and expressly stated, printed and advertised upon each package thereof, both personally and through his agents, has heretofore, does now and will unless restrained by the order of this Honorable Court, continue to widely advertise, give out and state that said process used in the manufacture of said Ariosa, is within the prohibition of, and in violation of, the aforesaid statute (Rec., pp. 6 and 7).

"XII.—Respondent has menaced and threatened with prosecution, and still menaces and threatens to prosecute dealers in, and vendors of, said Ariosa within Ohio, for a violation of the aforesaid statute, and as complainants verily believe, will, unless restrained therefrom by the order of this Honorable Court, institute a large number of prosecutions against such dealers in and vendors of said Ariosa, upon the wrongful and erroneous charge that the treatment of said Ariosa by the process above described is a violation of the statute aforesaid, and that said Ariosa is an adulterated food product within the said statute and the prohibition thereof. By reason of the aforesaid official capacity of the said respondent, and the fact that he claims to act under the said statute intended to prevent the adulteration of food products, said respondent's statements and threats of prosecution have led, do lead, and will hereafter continue to lead, the dealers in, and consumers of, said Ariosa throughout the United States and more particularly in Ohio, to doubt the healthful character and proper preparation of the said food product and the integrity of the complainants, as manufacturers thereof, and have deterred, do deter and will hereafter deter, both wholesale and retail dealers and consumers in Ohio and elsewhere from purchasing, vending

or using Ariosa, thereby greatly decreasing the repute and sale thereof, to the great and irremediable damage of complainants, the decrease in market value of the stocks of Ariosa, already manufactured and in the possession of the complainants, and of the aforesaid dealers and vendors thereof, and the great impairment of the good will of the aforesaid business of complainants (Record, p. 7).

"XIII.—On or about the fifth day of February, 1901, said respondent, in pursuance of his wrongful, erroneous and unlawful construction of the statute aforesaid, and without any authority of law therefor, and as complainants are informed and believes for the purpose of intimidating the customers of the complainants and deterring them from purchasing or dealing in said Ariosa, issued, or caused to be issued, over his signature, to dealers in and vendors of, Ariosa, and others, within Ohio, a certain circular letter or statement in the words and figures following, to wit:

"'STATE OF OHIO,

"'OFFICE OF DAIRY AND FOOD COMMISSIONER.

"'DEAR SIRS: Replying to your inquiry about the Coffee situation, would say that this matter is now under consideration and investigation by the chemists of this department. As soon as conclusions are reached, a circular notice will be sent to all the jobbers in Ohio, and a sufficient number will be furnished to supply all their salesmen.

"'I might say that the following firms have agreed to accept the law as construed by this department: Andrus, Scofield & Co., Columbus; Dayton Spice Mills, Dayton; Woolson Spice Co., Toledo.

"'W. F. McLaughlin & Co., of Chicago, have agreed to comply with the laws as soon as construed by the Court.

"'The only firm that has refused, and still refuses to accept the ruling of this department, or abide by the laws of the State as construed by our Supreme Court, is Arbuckle Bros., of New York.

"'Very truly yours,

"'J. E. BLACKBURN,

"'Dairy and Food Commissioner.

"'COLUMBUS, OHIO, February 5, 1901.'

"Said circular letter or statement is wholly false in this, to wit, that complainants have not at any time refused, and still refuse, to accept said construction of—Ohio, as construed by the Supreme Court of said State, and that, as complainants are informed and believe, the Woolson Spice Company has not agreed to accept the said law as construed by respondent, but, on the contrary, has refused, and still refuses, to accept said construction of said law, and still continues to sell, in the State of Ohio, coffee prepared and glazed by processes for a long time used by them.

"Said circular, while purporting to be an answer to an inquiry, was, in fact, by said respondent sent generally to jobbers and dealers in food products within Ohio, few, if any, of whom had, in fact, inquired as therein stated; and, as complainants are informed and believe, was so circulated without such inquiry for the purpose of intimidating complainants and their customers, and with the effect of injuring complainants and their property.

* * * * * *

By said circular the respondent accused and threatened to accuse complainants and the dealers in Ohio, in complainants' products of a crime punishable by law, and to do an injury to the property of complainants and of the dealers aforesaid, with intent to compel complainants and the dealers aforesaid to do acts against their will, to wit: to cease from selling and offering for sale said Ariosa within Ohio (Record, pp. 7, 8 and 9).

"XIV. Any prosecutions, as threatened by said respondent, under his false and erroneous construction of the said statute, will be wholly without authority of law, and will deprive complainants of their property, to wit: the value of the Ariosa already manufactured, now in the possession of complainants and awaiting sale, and the value of such Ariosa in the hands of dealers and vendors thereof throughout the United States, and more particularly in Ohio, and complainants' trade and the good will of their business of vending said product within said State of Ohio, without due process of law.

"XV. * * * and still further and irreparable injury will accrue thereto" (the prop-

erty rights of complainants) "if respondent be permitted to institute or conduct proceedings or prosecutions against the vendors of, and dealers in, said Ariosa, as he has threatened and still threatens to do (Record, p. 9).

* * * * * *

"XVIII. Owing to the number of dealers in, and vendors of, Ariosa in Ohio, who will, under the respondent's wrongful and erroneous construction of said statute, be liable to prosecution, and will be so prosecuted, if the said respondent be permitted to carry out his aforesaid threats, and menaces, a multiplicity of suits will necessarily arise involving identical questions, relating to the existence, constitutionality, construction, scope and effect of said statute and to the complainants' rights of property in Ohio, and to the effect thereon of said statute; and thereby complainants' rights of property in Ohio will be determined in litigations to which complainants will not be, and cannot be, parties.

"The interests of such dealers are, in many cases, not in common with, nor representative of, the interests of complainants, and, therefore, there is great and imminent danger that in many of such suits and prosecutions no defense will be made by the defendants therein, either through lack of interest, or in wrongful collusion and conspiracy with the respondent, and that thereby the question of the construction of said statute will, in many of said suits and prosecutions, not be properly or skillfully presented and passed upon; all to the great and lasting prejudice and damage of complainants, who have not now, and will not thereafter, have any adequate remedy at law in the premises.

"Although such prosecutions shall uniformly result in the acquittal of the persons thereby charged, yet by reason of the multiplicity thereof and the avowed determination of the respondents to prosecute all persons selling or offering for sale, in Ohio, complainants' said product, the mere wrongful prosecutions will result in deterring many, if not all dealers in good products, in Ohio, from dealing in Ariosa, and thereby prevent complainants from selling their said product in said State, to complainants' great and irreparable injury" (Rec., pp. 10 & 11).

"XIX. The matter in dispute herein, exclusive of interest and costs, largely exceeds the sum of or value of Two Thousand Dollars in this, to wit: That by the said statements, menaces and threats of the respondent, and the prosecutions threatened to be instituted by him, complainants' trade in Ohio and elsewhere, the good will thereof, and the market value of the existing stocks of Ariosa now in the possession of complainants, have been, and will be, damaged, depreciated, and diminished in value to the extent of more than one hundred thousand dollars (Rec., p. 11).

"XX. The wrongful acts which said respondent threatens to do and, unless restrained, will do, * * * will make unmarketable in Ohio, and to a very large extent impair and destroy the market value of the large stocks of Ariosa which complainants now have on hand in Ohio, and will to a large extent deprive them of their said business and the good will thereof in Ohio, and greatly injure, if not wholly destroy, the value of the same, and enable complainants' competitors selling in Ohio coffees treated by processes similar to, but not identical with, complainants' said process, to obtain complainants' said business, which can only be regained after long time and at great expense; and complainants will be put to other great expense in defending their said property rights in Ohio" (Rec., pp. 15-16).

And that this damage, even during the limited time necessary to determine this cause, will be more than one hundred thousand dollars --

"an amount largely in excess of respondent's "ability to respond in judgment" (Rec., p. 16).

The case is thus brought within the line of precedents of which the following are late examples:

Farquahar v. Nat. Harrow Co., 102 Fed. Rep., 714 (1900):

Dallas, Circuit Judge (715), "Where notices are given or circulars distributed in good faith to warn against infringement, no wrong

whatever is committed; but where, as is here averred, they are not made or issued with such intent, but in bad faith, and solely for the purpose of destroying the business of another, a very different case is presented. In such a case property rights are fraudulently assailed, and a Court of Chancery, whose interposition is invoked for their protection, should not refuse to accord it. Emack *v.* Kane (C. C.), 34 Fed., 46; Kelley *v.* Manufacturing Co. (C. C.), 44 Fed., 23; 10 L. R. A., 686; Casey *v.* Union (C. C.), 45 Fed., 135; 12 L. R. A., 193; Toledo A. A. & N. M. Ry. Co. *v.* Pennsylvania Co. (C. C.), 54 Fed., 730; 19 L. R. A., 387; Computing Scale Co. *v.* National Computing Scale Co. (C. C.), 79 Fed., 962: Lewin *v.* Light Co. (C. C.), 81 Fed., 904; Railway Co. *v.* McConnell (C. C.), 82 Fed., 65; Adriance, Platt & Co. *v.* National Harrow Co. (C. C.), 98 Fed., 118; *In re* Debs. 158 U. S., 564; 15 Sup. Ct., 900; 39 L. Ed., 1092. * * *

The decree is reversed, and the cause will be remanded to the Circuit Court, with direction to enter a decree disallowing the demurrer to the bill of complaint, and with leave to the defendant to answer within such time as that Court may prescribe."

Adriance, Platt & Co. v. *Nat. Harrow Co.*, 121 Fed. Rep., 827 (1903):

(828): "WALLACE, Circuit Judge. This is an action in equity to restrain the defendant from the publication of circulars and letters asserting the violation by the complainant of the defendant's rights under letters patent, and threatening the complainant's customers with suits. The Court below dismissed the bill.

The facts bring it within the principle of the decision of the Circuit Court of Appeals for the Third Circuit, in a suit brought in the District of New Jersey against the present defendant. The doctrine there declared is well settled by the authorities, and the opinion in that case contains a sufficient citation of them without further reference. A. B. Farquahar Co. *v.* The National Harrow Company, 102 Fed., 714; 42 C. C. A., 600; 49 L. R. A., 755."

(At p. 830): "Until the present action was brought, the defendant contented itself with

warnings and threats to the complainant's customers, and made no attempt to prosecute an infringement suit. The publicity of the complainant's suit neutralized these threats, and the defendant brought several actions against customers of the complainant. Out of its numerous patents it selected one, presumably the least infirm, as the basis of its attack upon the complainant's alleged infringing harrow. Those suits, after the proofs were taken, came to an end by the voluntary dismissal of the bill. The inglorious conclusion of these suits may afford an explanation of the defendant's reasons for preferring to attack the complainant by the circulars and letters rather than in a court of justice.

We conclude that complainant was entitled to an injunction and an accounting. The decree is accordingly reversed, with costs, and with instructions to the Court below to decree accordingly."

Except that it was not nearly so urgent, the case last cited is peculiarly on all fours with ours. There, as here, threats of prosecution were aggravated by defamatory circulars. There as here, after suit for injunction was brought, the defendant in such suit actually instituted a prosecution such as he had threatened. And here, as there, the prosecution instituted by the defendant has been thrown out of the Ohio State Courts, and Ariosa declared to be a healthful mixture or compound which it is not unlawful to manufacture or sell in Ohio (see *White* vs. *Ohio*, and quotations from opinion of Court therein, fully noted below).

(2.) *The multiplicity of suits otherwise probable, is in itself sufficient ground for injunction.*

This point is too clear to need extended citation of authorities, among the leading of which, under similar conditions, are:

Donald v. *Scott*, 67 Fed. Rep., 854: In that case the complainant had imported into South Carolina

certain packages, each being "one barrel of Rochester beer, made in the State of New York"; and averred that upon the arrival of each of such packages at Charleston (S. C.), its destination, it was

> (855.) "forcibly seized by the defendants, claiming to act as state constables" (of S. Carolina), "and taken and carried away by them under the pretense of authority of the act of the general assembly of South Carolina, approved January 2, 1895, commonly known as the 'Dispensary Law.' * * *
>
> "That upon each seizure, and after demand and refusal, he brought his action for the unlawful trespass on his rights by the defendants; and that, notwithstanding this, they persist therein, and manifestly propose to drive him to a multiplicity of suits. That he has no adequate remedy at law for these repeated violations of his rights, as the defendants are notoriously insolvent and pecuniarily irresponsible. He avers that so much of the dispensary law as is set up in justification of these acts of the defendants in preventing him from importing for his own use and consumption alcoholic liquors, the products of other states, into this state, violates the interstate commerce law as established by the constitution and laws of the United States, and is null and void."

Whereupon the injunction asked by him and granted by the Circuit Court was sustained by this Court in *Scott* v. *Donold*, 165 U. S., 58.

One of the latest cases in this point is

City of Hutchinson et al. v. *Beckham et al.*, 118 Fed. Rep., 399 (1902):

> (401) (Court, by Thayer, Circuit Judge,) * * * "the complaint which was filed in the lower Court may be appropriately termed a 'bill of peace' (Story, Eq. Jur., Secs. 852, 853). * * * One paragraph of the bill, as heretofore shown, alleged that the city authorities, for the purpose of enforcing compliance with the ordinance, had already caused the arrest of their agents, and were threatening to

make further like arrests, and to institute numerous criminal prosecutions, and thereby prevent them from receiving, storing, and making speedy deliveries of goods, as had been their habit. Now, conceding that the validity of the ordinance might have been tried in any one of the criminal prosecutions thus brought by the City, yet, as the right of appeal existed from any judgment which might have been rendered therein, it is apparent that months, and possibly some years, might have elapsed before the invalidity of the ordinance would have been definitely established, and that in the meantime the complainants might, and probably would, have been compelled to defend a multitude of suits and submit to daily interruptions of their business, which would have proven to be very annoying, and probably disastrous. In such a case, the rule that a suit in equity will not lie to restrain the collection of an illegal tax, merely on the ground of its illegality, does not apply, because circumstances are alleged which show that if left to their remedy at law the complainants would probably be subjected to numerous prosecutions, besides sustaining great and irreparable loss in the prosecution of their business" (authorities cited).

How much more urgent is the case here than those elsewhere adjudged, such as to warrant relief by injunction, is suggested by Paragraph X. of the bill (Record, p. 6):

"X.—Complainants now and at all times have on hand at various points throughout the United States large stocks of the compound or mixture known as Ariosa. Said stocks now in Ohio amount to one million pounds, more or less, of the value of one hundred thousand dollars, and in the United States to ten million pounds, more or less, of the value of one million dollars. Complainants have a large number of agents in Ohio and elsewhere, engaged in the sale of said Ariosa, and in addition thereto, as complainants are informed and believe, a great number of dealers, to wit, *more than ten thousand in Ohio*, have in their possession large quantities of

> Ariosa for sale, have heretofore sold and still are, and will continue, selling the same to consumers * * *."

(3.) *The construction of a statute is not a matter of discretion. Defendant-respondent is left equally unprotected, whether by a void statute (if his construction is correct), or by the fact (if his construction is wrong) that the law is not such as he assumes it to be.*

Appellee's brief on the argument in the Circuit Court of Appeals below quoted, betrayed what, we submit, is his radically mistaken theory of law.

> "But counsel may search in vain for either a precedent or a good reason for a Court interfering in cases where the executive is merely exercising his judgment as to the guilt or innocence of a citizen, *or as to the manner of interpreting a statute.*
>
> "In brief, the Court will never substitute its judicial control for mere executive discretion."

That is to say, appellee's assumption, upon which he practically rests his whole case, is that the interpretation of a statute is a mere matter of executive discretion.

We respectfully submit as too plain to need argument that appellee is totally in error; and that in this as in every other case where the construction of a statute is in question, there is in a legal sense no possibility for either executive or judicial *discretion;* but that the Court, using not its discretion but its judgment, must assume, as absolute for the case before it, that reading of the Act which it finds correct, and hold the acts of executive officers to be legal or illegal, according as they comply with it or not.

The *crux* of this case is here compressed into a nutshell. Appellee, an executive officer, considers himself vested with *discretion* to carry out the law

as he may think it should be construed; to enforce it according to his own judgment rather than the judgment of a court; and to enforce as law that which is in fact not law.

Appellants' contention, on the other hand, is that an act done by an executive officer under misapprehension of the law, is void, no matter how sincere his misunderstanding; and, therefore, that in regard to acts not authorized by such construction of the law as *the Court* finds to be the true one, his official station is no protection against any restraint to which a private person, acting under a similar mistake as to his own rights, would be subjected by the courts. There is no "discretion" to violate law, even in an "executive."

In short, the real question here (as always) is not so much the constitutionality of the law, abstractly considered, but whether, to the extent that it is valid, it justifies the acts complained of. As the Court said in *R. R. Co.* v. [illegible]*y*, 35 Fed. Rep., 866, quoted verbatim with approval in *Union Pac. R. Co.* v. *Alexander*, 113 Fed., 347, above quoted:

> (871.) "The bill rests solely upon the proposition that the property rights of the complainants are involved by the threatened action of the defendants, and this is a judicial inquiry to see whether they have authority for their action—whether the law on which they rely is valid and constitutional, *or suffictent to justify the action which they are taking.*"

(4.) *Defendant is utterly mistaken in the construction he claims for the Ohio statute, under color of which his threats are made—Ariosa being within the saving clause, and not within the prohibition of such statute.*

The bill here having been dismissed before answer, and its allegations, therefore, assumed to be admitted as on demurrer, its allegations of fact would

be sufficient upon this point, for they include the following:

"III.—For more than thirty years last past complainant, John Arbuckle, and his successive copartners, and for many years last past, these complainants have been and still are, engaged in the manufactnre and sale throughout the United States, including the State of Ohio, of a certain compound or mixture known as 'Ariosa,' composed of roasted coffee compounded and mixed with eggs and sugar, originated, invented, patented, manufactured, and sold solely by said complainants and their predecessors, and by them denominated 'Ariosa.' Ariosa consists of roasted coffee compounded and mixed with eggs and sugar, packed in sealed packages, ready for use by the consumer. * * * (Rec., p. 3.)

"V.—* * * for many years prior to 1894, complainants' predecessors caused to be printed upon each package of Ariosa, in conspicuous type, a certain label, statement and affidavit setting forth the use of said process and the purpose and effect thereof. And in or about 1894, complainants caused, ever since have caused, and still cause to be printed, in conspicuous type upon every package of Ariosa, a certain label, statement and formula being a true statement of the process and formula by and according to which said compound is manufactured and the purpose and effect thereof, in the words and figures following, to wit": (Here follow verbatim the statement and formula). * * *

(Complainants') "said process was not adopted and is not used for the purpose, nor with the effect, of lowering or depreciating or injuriously affecting the quality, strength, or purity of the coffee; nor of substituting any inferior or cheaper substance or substances, wholly or in part for it; nor of abstracting from it any valuable or necessary constituent or ingredient, either wholly or in part; nor of concealing damages or inferiority in the coffee, or making it appear better or of greater value than it really is; nor in any way whatsoever violating the provisions of the said statute of Ohio above set forth. On the contrary, the coffee used in

said compound or mixture is of good quality and undamaged; said articles of food used in the process above described for coating said coffee are, in themselves, pure, wholesome, healthful and innocuous; said preparation of egg and sugar, used in the said process for coating said coffee is colorless and transparent, and does not in any way conceal the true nature, grade, or original appearance of said coffee; and said process was adopted and used, and still is used, at great expense, for the benefit of the consumer only, the cost and value of the said ingredients used therein greatly exceeding in proportion to weight and bulk, the worth and value of roasted coffee." (Rec., pp. 5-6.)

"IX.—Ariosa is exclusively exposed for sale in sealed paper packages and the purchaser thereof is advised of its quality and composition; (1) by the general repute of the said compound; (2) by his former personal experiences in the use of the same, and (3) by the statement or affidavit setting forth its quality and composition printed on said packages as aforesaid; and is not and cannot be misled by the appearance of the coffee, at the time of the sale, which appearance is not disclosed until after purchase." * * *

"Said process is not used to affect or change the appearance of said coffe; any change in the appearance thereof due to said glazing being an incidental and immaterial consequence of the use thereof, not such as to assimilate said coffee in appearance to other or better grades, but such as to accentuate and render more clearly distinguishable any defects or imperfections which may exist in the same." (Rec., pp. 6 and 7.)

But, in addition, we have the authority, conclusive here, of the Ohio courts, which, on this point, have ruled directly against the construction claimed by the appellee and in favor of that claimed by the appellants here, and this in a late case where the precise point was litigated between appellee here and an Ohio dealer, whom, after this suit was brought, he actually did prosecute as by the bill herein it is alleged he had threatened to do.

James A. White was, April 1, 1901, arrested upon a warrant issued by Charles W. Meck, a Justice of the Peace of Toledo, charged with unlawfully selling to Edward B. Beverstock, an inspector in the employ of the Dairy and Food Commissioner of Ohio, "one pound of roasted coffee labeled 'Ariosa.'"

Trial was had. The defendant was convicted and sentenced to pay a fine of $50. He prosecuted error to the Common Pleas Court. The error case was heard before Pugsley, *J.*, who, November 14, 1901, rendered a decision reversing the judgment of conviction (see *White* vs. *Ohio*, *12 O*, *Nisi Prius Dec.*, 659). The opinion, upon this point, being as follows:

> "Upon the trial of the case it was contended by the defendant that upon the undisputed facts, the coffee sold by him as charged in the affidavit was within the proviso of the statute, which *exempts* from its provisions mixtures or compounds recognized as ordinary articles or ingredients of articles of food, when each and every package sold or offered for sale is distinctly labeled as a mixture or compound, with the name and per cent. of each ingredient therein, if they are not injurious to health; and that therefore he was not guilty of a violation of the law, and the jury should have been so instructed.
>
> "The undisputed facts as shown by the testimony are, that Ariosa coffee, a pound package of which was sold by White, was and had been for many years manufactured by Arbuckle Bros., and consisted of roasted coffee, coated or glazed with a mixture of sugar and eggs, constituting a transparent and exceedingly thin film; that the coffee so prepared was put up in packages holding a pound each, and tightly sealed, and that upon the wrapper inclosing each package was placed a label upon which were printed in clear large type the following words: 'Ariosa is a compound made from coffee, sugar and eggs. Choice eggs and pure granulated sugar are the only articles used in hermetically sealing Arbuckle's Ariosa coffee. Formula: Coffee,

.99978; eggs, .00361; sugar, .00361.' That the per cent. of each ingredient as stated in the label is correct; and that the coffee so prepared and put up for sale is not injurious to health. These facts being shown, the only question in dispute is, whether Ariosa coffee so prepared is a mixture or compound within the meaning of the law.

"In the first place, the statute itself to some extent furnishes a guide to the correct meaning of these words, for it says in Sec. 4200–5, 'The term food as used herein shall include all articles used for food or drink by man, whether simple, mixed or compound.' For the purposes of the statute, all articles of food are designated as either simple or mixed or compound. If an article of food may fairly and properly be called simple, then it is not mixed or compound; but if it cannot be fairly designated as simple, then it is mixed or compound, whatever may be the usual or recognized definition of those words when applied to other articles or objects than food. An apparent difficulty arises in attempting to define these words, from the fact that they are rarely used in connection with food; but when we consider the etymological sense of the words, the manner in which and the purpose for which they are used in the statute, and especially the manifest intent of the statute, I think there is no doubt as to their meaning.

"The Century Dictionary defines these words as follows: 'Simple: derived from the Latin *simplex;* onefold, as opposed to duplex, twofold; without parts; elementary; uncompounded.' Among numerous examples given of the use of the word in connection with various objects and conditions, the only one which bears any resemblance to the word as applied to food, is 'Simple medicine' which is defined as a medicine consisting of a single drug. 'Mixed' is defined as consisting of different elements or parts, mingled. Sample: mixed fish—fish of various kinds, including soft fish and hard fish. I will add examples not given in the dictionary, 'mixed pickles,' 'mince meat,' which is also sometimes put up in packages and sold, and which is composed of a variety of simple articles

of food. 'Mixture' is defined as 'that which results from mixing; a compound; the combination of different parts or ingredients. Mixture is a general term denoting a compound of two or more ingredients, more often, but not necessarily congruous.' 'Compound,' the adjective, is defined as 'composed of two or more elements, parts, or ingredients; not simple.' 'Compound, the noun, is defined as 'something produced by combining two or more ingredients, parts, or elements.' All articles of food being described in the statute as either simple, mixed or compound, and the words being given their ordinary signification, a simple article of food is a single article of food, one not consisting of parts or ingredients which are themselves articles of food. Food is compound or mixed, which is not simple. It is food consisting of two or more ingredients combined, united or mixed in any manner or to any extent. There is nothing in the law or the reason of the law which prescribes how the ingredients shall be combined or mixed, nor what shall be the relative proportions or situation of the ingredients in the combination or mixture. Ariosa coffee is composed of three ingredients—eggs, sugar, and coffee, each of which is a simple and recognized article of food. The combination is not simple food. Under the law it must be a compound or mixture, and for the purposes of the statute, it matters not which.

"The plain intent of the law is to protect the public health by forbidding the manufacture and sale of impure food, and to protect the public against being deceived by the purchase of an article of food which appears to be, or is represented to be, or by its name is supposed to be, something different, or purer or better than it really is. An examination of the seven different methods by which food may be adulterated within the meaning of the law, clearly shows that the articles of food, the manufacture and sale of which are prohibited, are only such as are injurious to health, or composed of unwholesome ingredients, or prepared in such a manner as is calculated to deceive and lead the buyer to purchase an article which is inferior in quality or purity to what

from its appearance or name he has reason to suppose it to be. Hence, in view of the object to be accomplished—to protect the public health and prevent deception—it was provided that an article of food composed of two or more ingredients which are recognized as ordinary articles of food, and no one of which is deleterious to health, whether singly or in combination, shall not be regarded as an adulteration, if it is put in a package and such package is distinctly labeled as a compound or mixture, with the name and per cent. of each ingredient. By the sale of such an article so prepared and put out for sale, the public health is not injured, and no one is deceived. It is not even calculated to deceive. Within the plain intent of the law it is unadulterated food, no matter in what manner or to what extent the ingredients are combined or mixed. In securing the object desired in enacting the law, no reason exists for exempting one method of combining the ingredients which does not apply to every other method, and it will not be presumed that any distinction in that regard was intended.

"It is contended by the prosecution that to form a compound or mixture, the ingredients must be so united or mixed as to form a new or distinct substance. If this means simply that the substance formed by the union or mixture must be something different from any of the ingredients, then Ariosa coffee is such new and distinct substance; but if it means that the identity of all the ingredients must be lost, or that they must be so united that none of them can be seen or detected in the substance formed, there is no reason or authority for the definition. Examples have already been given of articles of food which are clearly mixtures, although the identity of the ingredients is not lost. But a conclusive answer, it seems to me, is, that if an article of food is composed of two or more ingredients which are articles of food, it is not a simple food. It must, under the law, therefore, be what is there termed a compound or mixture; and whether or not the combination forms a new or distinct substance is immaterial.

"*I am clearly of the opinion that Ariosa coffee is within the proviso (saving clause) of the*

statute, and that it is not unlawful to manufacture or sell it. I find, therefore, that the Court erred in not instructing the jury to return a verdict of not guilty on the undisputed facts, and that the verdict rendered by the jury is contrary to the law and the evidence."

Whereupon White was absolutely discharged and Judge Pugsley's decision above quoted **accepted as a finality by the Dairy and Food Commissioner, the respondent here**—though the statutes of Ohio permits such a case to be taken to the Supreme Court for review, and a bill of exceptions under such statutes was allowed by the trial court for that purpose.

(5.) *To justify acts thereunder as within the police powers of the State, the construction of the statute permitting or requiring such acts must be—*

(*a*) *The proper and legal construction of such statute; and*

(*b*) *Such as subserves some public end justifying the exercise of such police powers.*

As to (*a*), argument will be superfluous. A statute has no existence except as properly and legally construed. Any other construction being at best but the mistake of the individual making it, and utterly void as a defense for his act thereunder.

As to (*b*), precedent is too well settled to justify more than brief reference to a few of the latest authorities:

In Matter of Jacobs, 98 N. Y., 98 (1885), the Court said (110): "Generally it is for the Legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of "its discretion is not subject to review by the courts. But they must

have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the Legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the Courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the Legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does conclude the Courts, and they must yet determine the fact declared and enforce the supreme law." * * *

After thorough and clear discussion of the point in question, the Court concludes with the statement of principle that has made it a leading case—

(115) "When a health law is challenged in the Courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the Courts must be able to see that it has at least, in fact, some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void. In reaching this conclusion we have not been unmindful that the power which Courts possess to condemn legislative acts which are in conflict with the supreme law should be exercised with great caution and even with reluctance. But as said by Chancellor Kent (1 Com., 450): 'It is only by the free exercise of this power that courts of justice are enabled to repel assaults and to protect every part of the government and every member of the community from undue and destructive innovations upon their charter rights.' * * *

In *Minnesota* vs. *Barber*, 136 U. S., 313 (1889), a writ of *habeas corpus* was prayed to release the pe-

titioner, who had been convicted of a violation of the statute of Minnesota respecting the inspection of fresh meats. The State of Indiana having passed a similar statute, counsel intervened on behalf of that State and took part in the argument of this case. The statute was held unconstitutional, the Court saying:

> (328) "It is one thing for a State to exclude from its limits cattle, sheep or swine actually diseased, or meats that, by reason of their condition, or the condition of the animals from which they were taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different thing for a State to declare, as does Minnesota, by the necessary operation of its statute, that fresh beef, veal, mutton, lamb or pork—articles that are used in every part of this country to support human life—shall not be sold at all for human food within its limits, unless the animal from which such meats are taken is inspected in that State, or, as is practically said, unless the animal is slaughtered in that State."

In re Marshall, 102 Fed. Rep. 323 (May 16, 1900):

An ordinance of Marin County, California, forbade any person in the County of Marin to use any repeating shotgun for the purpose of killing quail, &c.

Marshall was convicted in the State court of having killed a quail with a repeating shotgun.

Question was as to the constitutionality under Fourteenth Amendment, United States Constitution, providing that no State shall "deprive any person of life, liberty or property, without due process of law."

> Court (325): "* * * In the present instance, *what was the end sought? Manifestly, only the prevention of the taking or killing by any one person of more than 25 quail, partridge, or grouse in any one day.* * * *
>
> "* * * *That end is just as effectively accomplished without the obnoxious section as with it.* It is wholly immaterial to that object whether

> the sportsman or hunter uses a repeating or magazine gun, or a double or single barreled gun * * * and the opportunity of detection is just as great in one case as in the other. *No valid reason is therefore perceived, and none has been suggested by counsel why the owner of a repeating or magazine shotgun should be prohibited from using it.* * * *

See *Black on Interpretation of Statutes*, 304:

> "Statutes enacted by the Legislature in the exercise of the police power, for the promotion or preservation of the public safety, health or morals, may sometimes infringe upon the liberty of individuals by restricting their use of their property or abridging their freedom in the conduct of their business. When this is the case, such statute ought always to receive such a construction as will carry out the purpose and intent of the Legislature with the least possible interference with the rights and liberties of private citizens. * * * *And similar principles will be found applicable to laws* * * * *which concern the purity of food products* * * * *and to many other classes of enactments designed to further the general welfare by derogating from the liberty of a few.*"

Finally, in *White* vs. *Ohio*, 12 Ohio Decisions (N. P.), 659 (1901), we have an adjudication of the Ohio courts on the identical law and facts to which this point applies here.

April 1, 1901 (after our suit here pending was brought) James A. White, of Toledo, Ohio, was arrested on complaint of Beverstock, an employe of respondent, charging him, White, with a misdemeanor in that he had sold said Beverstock one pound of Ariosa coffee in violation of the very Statute, validity and construction of which is at issue here. Of the Opinion (more fully quoted *supra*) the following—a finding of fact as well as of law—at once illustrates and justifies our contention:

> PUGSLEY, *J.* "The plain intent of the law is to protect the public health by forbidding the

manufacture and sale of impure food, and to protect the public against being deceived by the purchase of an article of food which appears to be, or is represented to be, or by its name is supposed to be, something different, or purer or better than it really is. An examination of the seven different methods by which food may be adulterated within the meaning of the law, clearly shows that the articles of food, the manufacture and sale of which are prohibited, are only such as are injurious to health, or composed of unwholesome ingredients, or prepared in such a manner as is calculated to deceive and lead the buyer to purchase an article which is inferior in quality or purity to what from its appearance or name he has reason to suppose it to be. Hence, in view of the object to be accomplished—to protect the public health and prevent deception—it was provided that an article of food composed of two or more ingredients which are recognized as ordinary articles of food, and no one of which is deleterious to health, whether singly or in combination, shall not be regarded as an adulteration, if it is put in a package and such package is distinctly labeled as a compound or mixture, with the name and per cent. of each ingredient. By the sale of such an article so prepared and put out for sale, the public health is not injured, and no one is deceived. It is not even calculated to deceive. Within the plain intent of the law it is unadulterated food, no matter in what manner or to what extent the ingredients are combined or mixed. In securing the object desired in enacting the law, no reason exists for exempting one method of combining the ingredients which does not apply to every other method, and it will not be presumed that any distinction in that regard was intended." * * *

We therefore have as conclusions that need no argument.

(c.) *Properly construed, the Ohio Statute in question is no protection to respondent; and*

(d.) *Respondent's erroneous construction is as utterly futile as a defense here, as can be possibly be the statute itself were its effect such as he claims.*

Such is the latest construction of the Ohio law by the Courts of that State. The only other one, the old case of *Pre Digested Food Co.* vs. *Neal, Dairy Commissioner*, 4 Ohio Dec. (S. & C. P.), 456, being so clearly distinguished, not to say out of point, from our case that there would be no occasion to mention it, except that respondent here has so strenuously urged it.

In that case, plaintiff, on behalf of a medicine known as "Paskola," asked that the defendant, then Dairy and Food Commissioner of Ohio, be restrained—

(1) from prosecuting any one for selling "Paskola";

(2) from prosecuting more cases than defendant, in such cases, was able to defend;

(3) from publishing false statements as to the ingredients of "Paskola";

(4) from threatening plaintiff's customers that if they sell "Paskola" they will be arrested and prosecuted.

As will be seen from the decision: *In the Neal case no question whatever was made as to either the constitutionality or the construction of the Ohio law, under which the Commissioner was then proceeding*, and, whatever points might have been raised had proper allegations been made and such points been pressed, *the only ruling actually made was that a State Court would not restrain officials of its State from proceeding under a atute, the validity and construction of which were unquestioned, simply because their acts under such statute would affect property rights and depreciate a business.*

(6.) *In this case, beyond all others cited, complainants have no adequate remedy at law.*

In many cases injunctions have been granted to relieve a plaintiff from harassment by multiplicity of suits against *himself*. Though in such cases the

Court has sometimes held that in the particular instance his opportunity to defend was such that equity should not intervene.

In the case of criminal prosecutions, too, it has been sometimes suggested that, however, unpleasant such prosecutions may be, they are not merely against the person (which equity has no jurisdiction to protect) but at most *malum absque injuria*—since it must be assumed that the innocent will be acquitted.

In most cases where the complainants were non-residents of the jurisdiction where prosecutions were threatened, the courts have enjoined threatened multiplicity of suits against their agents, servants, &c., within such jurisdiction.

In our case, however—

(*a.*) The suits threatened are not against complainants; hence are not such as they can defend, if brought;

(*b.*) Nor are they against complainants' agents, or servants—who might, perhaps, be assumed likely, if sued, to permit complainants to defend them;

(*c.*) Nor are they against the personal liberty or political rights of complainants.

On the contrary, such threatened prosecutions are (1) against others than complainants—hence such as they cannot, of course, defend; (2) against those not in privity with complainants—hence under no obligation to permit complainants to aid in their defense; (3) not here complained of as attacks on the liberty of complainants or of any one else; but as interference with the *business*—that is with the *property rights*—of complainants—the precise class of wrongs against which the remedy of injunction was framed.

Remembering, as shown by the bill, that most of the more than ten thousand retail grocers in Ohio (prosecution of whom defendant threatens) would find it much more profitable to sell the coffee of

other manufacturers than to stand arrest and prosecution for selling Ariosa (no matter how convinced each might be that it was a healthful and honest preparation of coffee)—this being the precise intent of Blackburn's wrongful attack by threats and circulars—the allegations of the bill on this point are their own best explanation.

> "X. Complainants now and at all times have on hand at various points throughout the United States large stocks of the compound or mixture known as Ariosa. Said stocks now in Ohio amount to one million pounds, more or less, of the value of one hundred thousand dollars, and in the United States to ten million pounds, more or less, of the value of one million dollars. Complainants have a large number of agents in Ohio and elsewhere, engaged in the sale of said Ariosa, and in addition thereto, as complainants are informed and believe, a great number of dealers, to wit, more than ten thousand in Ohio, have in their possession large quantities of Ariosa for sale, having heretofore sold and still are, and will continue, selling the same to consumers, in preference to other brands of coffee * * * " (unless deterred as threatened) (Rec., p. 6).
>
> "XII. Respondent has menaced and threatened with prosecution, and still menaces and threatens to prosecute dealers in, and vendors of, said Ariosa within Ohio, for a violation of the aforesaid statute, and as complainants verily believe, will, unless restrained therefrom by the order of this Honorable Court, institute a large number of prosecutions against such dealers in and vendors of said Ariosa, upon the wrongful and erroneous charge that the treatment of said Ariosa by the process above described is a violation of the statute aforesaid, and that said Ariosa is an adulterated food product within the said statute and the prohibition thereof. By reason of the aforesaid official capacity of the said respondent, and the fact that he claims to act under the said statute intended to prevent the adulteration of food products, said respondent's statements and threats of prosecution have led, do lead, and will hereafter continue to lead, the

dealers in, and consumers of, said Ariosa throughout the United States and more particularly in Ohio, to doubt the healthful character and proper preparation of the said food product and the integrity of the complainants, as manufacturers thereof, and have deterred, do deter and will hereafter deter, both wholesale and retail dealers and consumers in Ohio and elsewhere from purchasing, vending or using Ariosa. * * *" (Rec., p. 7).

"XIII. * * * Said circular, while purporting to be an answer to an inquiry, was, in fact, by said respondent sent generally to jobbers and dealers in food products within Ohio, few, if any, of whom had, in fact, inquired as therein stated, and, as complainants are informed and believe, was so circulated without such inquiry, for the purpose of intimidating complainants and their customers, and with the effect of injuring complainants and their property.

* * * * *

"By said circular the respondent accused and threatened to accuse complainants and the dealers in Ohio in complainants' products of a crime punishable by law, and to do an injury to the property of complainants and of the dealers aforesaid, with intent to compel complainants and the dealers aforesaid to do acts against their will, to wit, to cease from selling and offering for sale said Ariosa within Ohio" (Rec., p. 9).

* * * * *

"XVII. Owing to the number of dealers in and vendors of Ariosa in Ohio who will, under the respondent's wrongful and erroneous construction of said statute, be liable to prosecution, and will be so prosecuted, if the said respondent be permitted to carry out his aforesaid threats and menaces, a multiplicity of suits will necessarily arise involving identical questions relating to the existence, constitutionality, construction, scope and effect of said statute and to the complainants' rights of property in Ohio, and to the effect thereon of said statute; and thereby complainants' rights of property in Ohio will be determined in litigations to which complainants will not be, and cannot be, parties.

"The interest of such dealers are, in many cases, not in common with, nor representative of, the interests of the complainants, and, therefore, there is great and imminent danger that in many of such suits and prosecutions no defense will be made by the defendants therein, either through lack of interest or in wrongful collusion and conspiracy with the respondent, and that thereby the question of the construction of said statute will in many of said suits and prosecutions not be properly or skillfully presented and passed upon; all to the great and lasting prejudice and damage of complainants, who have not now, and will not thereafter, have any adequate remedy at law in the premises.

"Although such prosecutions shall uniformly result in the acquittal of the persons thereby charged, yet by reason of the multiplicity thereof and the avowed determination of the respondents to prosecute all persons selling or offering for sale, in Ohio, complainants' said product, the mere wrongful prosecutions will result in deterring many, if not all, dealers in good products, in Ohio, from dealing in Ariosa, and thereby prevent complainants from selling their said product in said State, to complainants' great and irreparable injury."

It must constantly be kept in mind that *the injunction here asked is even more against the threats than the prosecution*. To some extent actual prosecution may be met. But against *threats of prosecution*—here the most damaging portion of defendant's attack—injunction is the only defense possible against irremediable damage from this prostitution of respondents personal influence, largely resulting from his office.

Complainants are residents of a distant State; respondent has threatened to prosecute, not complainant's agents, but each of the more than ten thousand retail dealers who now handle complainant's Ariosa in the State of Ohio. Not one of them has any privity with complainants or any interest either to protect them or to continue selling their

product at the risk of criminal prosecution. Complainants are powerless either to make or compel defense, and still more so to procure the Ohio retail dealers to submit to arrest, fine and imprisonment, that writs of *habeas corpus* may be taken out for complainants' benefit. There is, therefore, no adequate remedy at law for the threatened and inevitable injury to complainants' property rights.

The alternative certain to occur is precisely that which the threats of the respondent are aptly designed to produce, and which, as the affidavits herein submitted show, such threats actually have produced—the refusal by the grocers of Ohio to keep the complainants' product on sale, the destruction of the immensely valuable good-will of complainants' business in Ohio, and consequent great and irreparable injury to the complainants, for which the respondent is unable to respond in damages, even if they could be calculated.

It will not do to answer that complainants should come into Ohio and there engage in marketing Ariosa expressly in order to be prosecuted. One of the purposes for which the Federal Courts are constituted is to afford remedies at law and equity in each State to those residing elsewhere whose rights require such protection. Respondent is attacking our property, the good-will of our business. He is destroying it by his threats to prosecute, not us or our agents, but the ten thousand grocers of Ohio who are not bound to defend our interests, and with whom we are not in privity.

This feature distinguishes our case from all others where injunctions have been refused, and brings it peculiarly within those where the Court will seek a way to protect the property rights thus threatened.

> "No maxim is more firmly rooted in English and American jurisprudence than the one which, given a free translation, declares that 'No wrong shall exist without a remedy.'"[1]

[1] Spelling on Extraordinary Relief (Preface).

(7.) *The statute in question, if construed as respondent claims—and in any case his such construction—is unconstitutional and of no protection to him.*

(*a*) Because an attemped interference by a State with interstate commerce, expressly relegates to Congress by Article 1, Section 8, Clause 3 of the Constitution of the United States.

(*b*) Because a denial to complainants by the State of Ohio of the equal protection of its laws in violation of the Fourteenth Amendment of the Constitution of the United States.

(*c*) Because a deprivation of complainants by the State of Ohio of their property without due process of law; also in violation of the Fourteenth Amendment of the Constitution of the United States.

This case being, as it were, argued on demurrer to the bill, it would be superfluous to more than so note the issues involved as to show that they are in fact raised by the allegations of the bill, and to settle such precedent as may suggest our position.

As to (*a*), (*b*) and (*c*), after setting forth facts abundantly justifying such conclusions, the bill alleges (Record, pp. 9 and 10):

" XVI. Said statute, construed as respondent claims it should be, is in conflict with the fourteenth amendment to the Constitution of the United States, and void, in that it would deprive complainants of their aforesaid property by prohibiting them from selling in Ohio, and dealers in, and vendors of, food products from purchasing from the complainants pure food products, which are ordinary articles of food and are not injurious to health, to wit, coffee, sugar and eggs and a mixture of compounds recognized as an ordinary article and ingredient of food and not injurious to health and all the ingredients of which are recognized as ordinary articles of food and are not injurious to health, and from dealing in the same, in Ohio, and by destroying the value of said product as an article

of commerce by prohibiting the purchase and sale thereof, and thus would deprive complainants not only of the just and lawful benefits accruing to them by reason of their property rights acquired in said food products as aforesaid, but, further, would largely destroy the market value of the existing stock of Ariosa in the possession of complainants in Ohio and elsewhere and would deny to these complainants and to the dealers in, and vendors of, said Ariosa, within the jurisdiction of the State of Ohio, equal portection of the law.

"XVII. Ariosa is manufactured and treated, according to the aforesaid process, at complainants' factories in New York and Pennsylvania, and not in Ohio. After being so manufactured and treated, it is at said factories packed in packages, and is, in said original packages, shipped by complainants into Ohio; and is sold in such original packages; and said statute, if construed as the respondent herein claims it should be, is a regulation by the said State of Ohio of interstate commerce, and is repugnant to, and in violation of the third clause of section eight of article one of the Constitution of the United States, and void."

See *Matter of Jacobs* (*supra*):

(105) "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."

In *Jew Ho* vs. *Williamson*, 103 Fed. Rep., 10 (1900), a similar case, the Court held:

(23.) "But there is still another feature of this case that has been called to the attention of the Court, and that is its discriminating charac-

ter; that is to say, it is said that this quarantine discriminates against the Chinese population of this city (citing Yick Wo *vs.* Hopkins, 118 U. S., 356). 'Though the law itself be fair on its face and impartial in appearance, *yet, if is applied and administered by public authority with an evil eye and an unequal hand*, so as practically to make unjust and illegal discriminations, between persons of similar circumstances, material to their rights, the denial of equal justice *is still within the prohibition of the Constitution*.'

(26.) "It follows from the remarks that I have made, that this quarantine cannot be continued, by reason of the fact that it is unreasonable, unjust and oppressive, and, therefore, contrary to the laws limiting the police powers of the State, and municipality in such matters; and, second, that it is discriminating in its character, and is contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States."

Schollenberger vs. *Pennsylvania*, 171 U. S., 1 (1898):

The last mentioned decision being of the United States Supreme Court, and hence of absolute authority here, is peculiarly strong, in that it protects interstate commerce, not merely in food products, though so prepared as to violate provisions of State law which are assumed to be valid as to manufacture within such State, but specifically protects articles which are the subject of interstate commerce, from State prohibition, even though they are so far the subject of adulteration as to justify inspection, &c., laws. The Court says—

(15.) "The fact that it may be adulterated does not afford a foundation to absolutely prohibit its introduction into the State. Although the adulterated article may possibly in some cases be injurious to the health of the public, yet that does not furnish a justification for an absolute prohibition. A law which does thus prohibit the introduction of an article like oleomargarine within the State is not a law which regulates or

restricts the sale of articles deemed injurious to the health of the community, but is one which prevents the introduction of a perfectly healthful commodity merely for the purpose of in that way more easily preventing an adulterated and possibly injurious article from being introduced. We do not think this is a fair exercise of legislative discretion when applied to the article in question."

The Court further distinguishes the case of simultation of a different article, that is, misrepresentation—

(17.) "Nor is the question determined adversely to this view in the case of *Plumley* vs. *Massachusetts*, 155 U. S., 462. The statute in that case prevented the sale of this substance in imitation of yellow butter produced from pure unadulterated milk or cream of same, and the statute contained a proviso that nothing therein should be construed to prohibit the manufacture or sale of oleomargarine in a separate or distinct form and in such manner as will advise the consumer of its real character, free from coloration or ingredients that cause it to look like butter.' This Court held that a conviction under that statute for having sold an article known as oleomargarine, not produced from unadulterated milk or cream, but manufactured *in imitation of yellow butter produced from pure unadulterated milk or cream was valid.*

(18.) "It will thus be seen that the case was based entirely upon the theory of the right of a State to prevent deception and fraud in the sale of any article, and that it was the fraud and deception contained in selling the article for what it was not, and in selling it so that it should appear to be another and a different article, that this right of the State was upheld. * * *."

And concludes:

(24.) * * * "*The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His*

right is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the State to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the State law does really inspect and does not substantially prohibit the introduction of the pure article and thereby interfere with interstate commerce. It cannot, for the purpose of preventing the introduction of an impure or adulterated article, absolutely prohibit the introduction of that which is pure and wholesome. The Act of the Legislature of Pennsylvania, under consideration, to the extent that it prohibits the introduction of oleomargarine from another State and its sale in the original package, as described in the special verdict, is invalid."

(8.) *In a case where serious wrong cannot otherwise be righted, equity will neither hesitate to exercise its jurisdiction to the full extent of its scope, nor be nice to seek reasons why it should not do so.*

Southern Exp. Co. vs. *Mayor, &c., of Ensley*
116 Fed. Rep., 756 (1902):

JONES, District Judge:

(761.) "The courts of the United States should not be astute to find technical reasons for denying the affirmative enforcement of such a right on the theory that the wrong would be irreparable, if the money lawlessly exacted as a commutation for the right which the constitution gives without price can finally be recovered back from the wrongdoer. Compelling the citizen thus wronged to first pay the unlawful exaction, and then sue for damages or to recover the money, puts the constitution in abeyance for the time being, and forces the citizen temporarily to submit to the wrong as a condition precedent to enforcing the constitution. However proper such a view may be as regards ordinary trespasses to mere property rights, it

seems out of place in dealing with the forcible denial of a fundamental constitutional right."

Niagara Fire Insurance Co. vs. *Cornell*, 110 Fed. Rep., 816 (1901):

McPHERSON, District Judge:

(820.) "I suppose all the States have special proceed ings for the hearing of grievances, and such proceedings are sustained if along the line somewhere, and by some reasonable method, the party can have a hearing in the courts. And it is equally clear that such remedy is not to the exclusion of the power of a Federal court to act. There may be a plain speedy and adequate remedy at law in the State courts, but with the proper parties, with the requisite citizenship, and the necessary amount involved, a federal court sitting in chancery may take hold of the case and order the proper decree. And the more so is this true when federal questions are presented, as in this case. And these conclusions, but briefly stated, obviate the discussion of many questions argued by counsel. * * *

(826.) "I had supposed, and still believe, that an unconstitutional law was as though never passed."

Central Trust Co. vs. *Citizens' St. R. Co.*, 80 Fed. Rep., 218 (1897):

SHOWALTER, Circuit Judge:

(226.) "My opinion is that, where proceedings in effect destructive of a vested property right are threatened by a defendant in official position under color of a void statute, the preliminary injunction ought to issue.

The suggestion by the learned attorney general that, in any event, this Court ought not to consider the case made by this bill until the Supreme Court of Indiana has pronounced upon the specific enactment in contention, is one which I have no right to entertain It is ordered that the injunction issue as prayed."

Union Pac. R. Co. vs. *Alexander*, 113 Fed. Rep., 347 (1901):

(350.) "The bill rests solely upon the proposition that the property rights of the complainants

are involved by the threatened actions of the defendants, and this is a judicial inquiry to see whether they have authority for their actions—whether the law upon which they rely is valid and constitutional, or sufficient to justify the action which they are taking. It was insisted at the argument that the complainants had an adequate remedy at law, and therefore a court of equity had no jurisdiction. The rule, as I understand it, is that the jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances. Within this rule, I think, the bill states a case of equitable cognizance, and the conclusion reached is that the Court has jurisdiction.

"This brings us to the consideration of the second question, viz.: Does the act of the Legislature in controversy in this case conflict with the provisions of the constitution of the State? It was insisted at the argument that the Federal courts will not willingly pronounce, in advance of the State courts, an act unconstitutional. This is quite true, but it is conceded in one of the briefs handed to me by defendants' counsel that the Supreme Court has not passed upon the constitutionality of this act, and in the language of Chief Justice Marshall in the case of Cohen *v.* Virginia, 6 Wheat., 264, 5 L. Ed., 257, the judiciary cannot, as the Legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it is brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given."

Smyth vs. *Ames*, 169 U. S., 466 (1898).

(p. 478.) "We cannot accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular State in which suit may be brought.

> One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that Court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a State court on the same cause of action. * * * (Cases cited). But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of federal jurisdiction (Cases cited)."

CONCLUSION.

In short, eggs, sugar and coffee, each being an ordinary and healthful ingredient of food, any citizen of Ohio has a right to sell, purchase or use either, in any shape he sees fit. It is no business of the State how much he values each, the proportion in which he shall mix them, or the manner in which he shall prepare, drink, or otherwise use them. If he chooses to buy them, compounded or mixed, or, if the prosecution prefer, "aggregated," as Ariosa, he has a right to do so. The term "Ariosa" having become in common use to describe a food article, prepared as here shown, it is his right on purchasing "Ariosa" to receive it. He would be defrauded should there be delivered him upon his order for Ariosa a coffee preparation lacking the glazing here complained of. It would be as impertinent as it would be intolerable and illegal for the State to dictate to him what he shall want, or to the man from whom he purchases what he shall give, instead of the article ordered. Whether he wishes eggs and sugar with his coffee, or why he wishes it, is his business, not that of the State or of any follow-citizen.

The facts here are peculiarly clear. For above thirty years a certain preparation has been manu-

factured, marketed and used under a certain name. It is not claimed to be either a simulation of anything else, or to be other than an ordinary healthful food product. The particular glazing here in question is *the* characteristic demanded by the purchaser when he asks for Ariosa, instead of some other brand. He has a right to have it; the vendor has a right to sell it to him.

> " * * * The Courts have gone to great length in upholding legislation under the police power. In some decisions it has been so magnified as to be regarded as almost omnipotent. We do not agree to the doctrine that under this power, or any other, the legislature can make criminal the mixture or mingling of articles of food which are wholesome and nutritious, and prohibit the sale thereof." * * *
>
> *Dorsey vs. State of Texas*, 40 L. R. A., 201, 202 (Tex., 1898).

A law having such effect as claimed for the Ohio statute by the respondent here, would be unconstitutional, and its mistaken construction by any individual to such effect is even less entitled to respect.

Respondent's property interests are entitled to protection, by injunction, against such attack, as that of respondent, set forth in the bill.

It is respectfully submitted that the learned Judge of the Circuit Court erred, both in refusing to entertain jurisdiction of the cause and in the dismissal of the bill without hearing, and that the judgment below should be reversed, with costs.

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WILLIAM O. HENDERSON,
BROWN & GEDDES,
Solicitors for Appellants.

JOHN DEWITT WARNER,
CLARENCE BROWN,
Of Counsel.

FILE COPY.

NO. 18578.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 66.

Office Supreme Court U. S.
FILED
NOV 9 1903
JAMES H. McKENNEY, Clerk

JOHN ARBUCKLE, ET AL.,

APPELLANTS.

vs.

JOSEPH E. BLACKBURN, DAIRY AND FOOD COMMISSIONER OF THE STATE OF OHIO.

APPELLEE.

BRIEF FOR APPELLEE.

ROSCOE J. MAUCK,
EDMOND B. DILLON,
Solicitors for Respondent.

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STATEMENT.

Appellants on March 9th, 1901, filed in the original trial Court an amendment to their Bill of Complaint, which was evidently found necessary by the more careful examination of the law, and which seems to impute to the respondents, malice, bad faith in the execution of his official duties, and favoritism to complainants' competitors. It was deemed proper therefore to file an affidavit of the respondent below controverting such statements and a number of other statements contained in the original bill, so that if it were sought

on the part of complainants to have had their provisional injunction granted upon the theory that all the acts, motives, malice and bad faith alleged are admitted to be true, they were denied with full force and therefore cannot possibly be the basis upon which a provisional injunction could have been granted in this case.

GROSSLY IRRELEVANT MATTER.

The Bill of Complaint is filled with irrelevant matter, arguments, speculations and the like. These should be eliminated by the Court in considering this cause. For instance, the fact that the complainants have hundreds of thousands of dollars and millions of pounds of coffee invested, does not entitle them to any greater consideration than they would be entitled to if they were dealers on a more moderate scale. Likewise the further allegation to the effect that they have continuously practiced this method of coating their product for a long period of time, cannot possibly have any weight or consideration in this case, although Counsel seem to assume from the attention given such allegation, that having so long manufactured the article in the manner stated, the complainants had acquired some prescriptive right, whereby they were not amenable to the laws of Ohio. Likewise the numerous allegations as to the healthfulness of "Ariosa," are wholly irrelevant. A reading of the Statute will convince one that the question cannot be raised. "Irish moss" is brought into the case. After being brought into the case, it is then taken out and the statement made that it has not been used for twenty years. We respectfully submit that this might well be eliminated from the Bill of Complaint.

The fourth allegation is that the complainants have, at a large expense, widely advertised their product. We submit that this allegation can have no weight or influence in determining the question involved. The fifth allegation is to the effect that the complainants have caused a label and statements to be made upon the back of their sealed packages, consisting of a very flattering series of statements as to the

merits of their compound, which can have no possible bearing here, but, concluding with the formula, which we shall discuss later and show to the Court to be a mere attempt to substitute form for substance.

The further statement contained in the sixth allegation of the Bill of Complaint to the effect that the consumers have had very favorable experience in using complainants' coffee and that a great many people have preferred it to other brands, and that it has gained a great reputation and sale among the people of Ohio, and has a very palatable taste, and is a good and cheap article for the people to use, and that the complainants have the confidence of the purchasers and consumers are all matters that must be ignored by the Court and cannot possibly be considered fro many legal standpoint whatever.

Taking up the seventh allegation we find that we are informed as to four different methods by which coffee roasters attempt to deceive the public. Of course this matter has nothing to do with the case.

In the eighth allegation, we are assured that complainants' process does not include any of the foregoing processes and we are again furnished with a long statement concerning fresh eggs and refined sugar, all of which is set forth at length in a previous part of the Bill.

The ninth paragraph is also open to the objection last stated.

By the tenth allegation we are informed that the complainants have a large stock, amounting to millions of pounds in Ohio and in the United States to ten million pounds, and to the value of from one hundred thousand to one million dollars. The inference seems to be that large dealers in food products are exempt from interference from State authorities. Manifestly the entire tenth allegation is not only irrelevvant but likewise redundant.

The eleventh allegation declares that the respondent, Joseph E. Blackburn, as Dairy and Food Commissioner, without authority of law, and falsely and erroneously considering

the provisions of the Statutes, and notwithstanding the fact that the complainants' product is not in violation of the Statute, and that the Statute is not applicable in the premises, and notwithstanding the fact that a formula of the coffee is plainly printed on every package, will proceed to take certain steps to enforce the law. The greater part of this eleventh allegation consists of the pleading the mere legal conclusions and with the exception of possibly one paragraph therein, should all be ignored.

In the twelfth allegation there is a very long statement as to what effect any intention to prosecute would have upon the number of dollars which complainants might receive from sales of their products in Ohio, and how the market value of stocks of Ariosa might fall, and a lot of other similar allegations, all of which could be just as well pleaded by any person who has been arrested, indicted or who is threatened with arrest or indictment for some crime and it is hardly necessary to say that all of it is purely irrelevant and incompetent.

The thirteenth allegation of complainants' bill sets forth a circular which the Dairy and Food Commissioner issued on February 5, 1901. The statement of what said circular may have done, and as to it being true or false, are wholly irrelevant, and said circular cannot possibly be considered by this Court unless it should be alleged that the respondent intended to or would issue said circular in the future and with this exception, the entire mass of complaint of said circular, is irrelevant.

The fourteenth allegation is to the effect that any prosecution under the respondent's construction of the Statute, would be without authority of law, etc., a conclusion of law that is of course to be argued by counsel, and not to be placed in the Complaint.

The fifteenth allegation likewise avers a legal conclusion.

The sixteenth allegation is a complement to one of the previous allegations in that it is here alleged that if the Statute be construed as respondent claims it should be, it is then

in conflict with the Fourteenth Amendment to the Constitution of the United States, and thereby raises that question; but the allegation does not fail to bring in the coffee, sugar, and eggs and referring again to the great loss which they would have in the way of dollars and depreciation of the market value of stock.

The seventeenth allegation raises the question of interstate commerce which will be argued below.

The eighteenth allegation contains quite a flattering statement as to the great and ponderous number of persons who handle their goods, and in fact complains as to what an inconvenient thing it would be for them to be compelled to see all of these dealers prosecuted and have to defend them. Of course the only inference is that if complainants were small dealers, prosecution would be proper enough, but since they have such gigantic monopoly, they are exempt. The entire eighteenth allegation cannot possibly be considered by this Court in deciding the case at any stage.

THE REAL QUESTION.

Stripped of verbiage, flattering statistics, redundancies, irrelevant allegations and legal conclusions, the Bill of Complaint, exclusive of its formal parts, can be expressed thus:

"Complainants, non-residents of Ohio, ship packages containing a certain food product, to grocers. These grocers sell the same in Ohio. Complainants claim that said food product has not hitherto violated any of the laws of Ohio, and that they do not intend to manufacture it so it will violate the said laws in the future. The respondent, the Dairy and Food Commissoner, is threatening to say that in his opinion the food products do violate the laws of Ohio, and he is unable to say what complainants' conduct may be in the future in that regard. Wherefore complainants pray for two things; first that the Dairy and Food Commissioner may be enjoined from saying that in his opinion complainants' goods violate the Statute of Ohio; and second that he be enjoined from arresting any person who may be found at any time, in any

place, selling any goods which on the outside packages thereof, has the complainants' name and trademark."

In other words they simply say, "We have never violated any of the laws of Ohio in the past and don't intend to in the future, and desire all the executive machinery, investigations, unfavorable reports of chemists, etc., etc., enjoined, not only as to us, but as to any person selling our goods."

THIS CASE REPORTED.

The report of this case will be found in 51 U. S. C. C. A., 122.

The clear, concise and able opinion there given by Mr. Justice Day would be marred by any excerpt, and we therefore respectfully ask its careful perusal by this Court. In itself it is a sufficient answer by way of argument, to the contentions of appellants herein.

PRECEDENTS FOR THIS ACTION.

Cases exactly similar to the one at bar are extremely rare. Indeed the boldness of this proceeding and the unprecedented action sought to be taken have never been sustained by any authority. Therefore it is not surprising that similar cases to it are rare. We find but two in Ohio, and they are exactly in point.

First, the case of Williams et al. vs. McNeal, Dairy and Food Commissioner, which was decided in 1892, 7 C. C., 280 where the Court holds as follows:

> "1. The Dairy and Food Commissioner is authorized to print, publish and circulate such matter as may be necessary to inform dealers and the public of violations of the laws against fraud and adulteration or impurities in food, drinks or drugs.
>
> "2. Section two of the act of March 21, 1887, (85 Ohio Laws, 216, Section 7458-17, Revised Statutes) is valid and constitutional."

We invite the Court's attention to this case and the decision of the Court therein.

The second case is that of the Pre-digested Food Company vs. McNeal, Dairy and Food Commissioner, decided by Judge

Smith of the Superior Court of Cincinnati, in 1895, and is reported in 1st Ohio Nisi Prius Reports, 266.

While this is a decision of one of the inferior Courts of Ohio, nevertheless the decision of Judge Smith in this case is so able and exhaustive that it is with the greatest of pride that this case might be cited to any Court. The decision is about as lengthy as our entire brief, and we submit that decision to this Court in the greatest confidence.

We find no cases at all in favor of Complainants' action.

SUIT AGAINST THE STATE.

The action affects and is for the benefit of third parties, to wit retail grocers who now or hereafter may sell Complainants' product. The real effect of this action on the part of complainants seems to be not to enjoin the respondent from arresting them, but that the injunction which is to issue, shall be for the benefit and use of the many persons who may buy their product, amounting as they say to about ten thousand persons in Ohio now.

On the part of the respondent the injunction does not seek so much to bind him, since he personally does not make any arrests or swear to any affidavits. To be effective therefore the injunction must control all the prosecuting attorneys of Ohio, all the inspectors, and atttorneys for the department, chemists, etc., none of whom are parties to this action.

Of course if this injunction should be granted, we presume that all the professors in the State of Ohio and especially the expert chemists who should find, according to their analysis, that Arbuckle's coffee was adulterated, would be compelled to come to a different conclusion, because of the injunction.

More than this, any citizen in Ohio may file an affidavit charging any person with violating any criminal statute.

Therefore this injunction, to be of any avail, must bind all persons representing the State of Ohio as well as its citizens, and therefore it is in substance and effect against the state.

In the case of Cunningham vs. R. R. Co., 109 U. S., 446, it is held in the second syllabus that:

"Whenever it is clearly seen that a State is the indispensable party to enable the Court, according to the rules which govern its procedure to grant the relief sought, it will refuse to take jurisdiction."

And in this same case, the case of Davis vs. Gray, 16 Wall., 203, is questioned and a perusal of the two cases will be sufficient to convince the Court that the dissenting opinion of Chief Justice Marshall in the old case of Davis vs. Gray, is now the law of the land. And the Court lays down the doctrine that the indirect way of making the State a party, is just as open to objection as if the State had been named as a defendant.

AS TO ARIOSA BEING A PATENTED ARTICLE.

We cannot agree with counsel that the law makes a distinction between articles which have been patented and articles which have not been patented, and that while the latter are subject to the laws of the State and its vendors compelled to abide by them, but that the former and its vendors are exempt. Apellants say in their complaint in substance that a patent having been granted to the compainants for this article, if the Ohio Statute prohibited its sale or offer for sale, then said Statute is in conflict with the lawful powers of the United States. All reasoning is manifestly against any such discrimination, and the decisions do not sustain this contention. This question was raised very pointedly in the case of Palmer vs. The State, 39 O. S., 236. In that case John Palmer was convicted of violating the pure food statutes of the State of Ohio. His defense made in the Police Court was that the substances sold by him were manufactured under letters patent issued by the United States and that therefore the law in so far as it applied to him, was unconstitutional and void. In that case in the Supreme Court of Ohio, the Court says:

"The patent laws of the United States give to inventors the exclusive right to their inventions, but do not give to them the right to disregard laws enacted to promote the

welfare of the whole people. The State cannot discriminate against patented articles by imposing upon their sale conditions and restrictions not placed upon the sale of other similar articles; but the sale of all articles like those now under consideration, whether patented or not, may be restricted, regulated or forbidden, whenever the public good requires such restriction, regulation or prohibition.

These principles have been recognized and illustrated in a number of cases decided by this Court, and by the Supreme Court of the United States. Among the leading cases are Jordan vs. Overseer of Dayton, 4 Ohio, 295; State ex rel. vs. Telephone Co., 36 Ohio St., 296; Patterson vs. Kentucky, 97 U. S., 501; and Webber vs. Virginia, 103 U. S., 344.

It is claimed, however, that laws regulating the sale of patented articles can be sustained only when they come fairly within the police powers of the State; and those powers extend only to regulations relating to the health, morals, good order and comfort of the people, and that the provisions of Section 7090 are merely intended to prevent fraud. The language of the act supplementary to Section 7090, passed April 26, 1881, shows very plainly that the design of the Legislature in passing Section 7090 as well as the supplementary section, was to prevent the sale of impure and unwholesome food, and that both sections, therefore, come within the most narrow definition of police regulations. If it were conceded, however, that none of the substances described in Section 7090 are positively injurious to health, we hold that the law is within the general powers possessed by the State. Those who buy food have a right to know what they buy, and to have the means of judging for themselves as to its quality and value."

And we would call the court's special attention to the case of Patterson vs. Kentucky, 7 Otto., 501, which unequivocally holds that the rights conferred upon a patentee must be exercised in subordination to the police regulations which the State has established by Statute.

AS TO THE CONSTITUTIONALITY OF THE STATUTES.

We apprehend that the claim set forth that the dairy and food Statute of Ohio in question here, is repugnant to the Constitution of the State and of the United States is not very seriously contended for. In the very limited time before us, we will discuss it but briefly.

> "It being within the Constitutional power of the Legislature to establish regulations for the prevention of fraud in the sale of articles of food, it is generally for the Legislature to determine what regulations are needed for that purpose."
>
> Cooley's Const. Lim., 3rd Ed., 168.

In the case of Commonwealth vs. Huntley, 156 Mass., 236, it is held as follows:

> "The enactment of a Statute which forbids the manufacture and sale of oleomargarine which is made in imitation of yellow butter is a valid exercise of the police power which remains in the several States, though such oleomargarine has been imported from another State; and it is not in violation of the constitutional provision giving to Congress the power to regulate commerce among the several States."

And likewise in the case of Powell vs. Penn., 127 U. S., 678, the Court holds:

> "(1) The Fourteenth Amendment to the Constitution was not designed to interfere with the exercise of the police power by the State for the protection of health, the prevention of fraud, and the preservation of the public morals.
>
> "(3.) Whether the manufacture of oleomargarine or imitation butter of the kind described in the Act of the Legislature of Pennsylvania of May 21, 1885 (Laws of Penn. of 1885, p. 22, No. 25) is, or may be, conducted in such a way or with such skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to the public health as to require for the protection of the people the entire suppression of the business, rather than its regulation, in said manner as to permit the man-

ufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy, which belong to the legislative department to determine.

"(4.) The Statute of Pennsylvania May 21, 1885, 'for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof, neither denies to persons within the jurisdiction of the State the equal protection of the laws; nor deprives persons of their property without that compensation required by law; and is not repugnant in these respects to the Fourteenth Amendment to the Constitution of the United States."

And we would also call the Court's attention to the case of Schollenberger vs. Pennsylvania, 171 U. S., 1, where the subject is further discussed and the case of Powell vs. Penn., reaaffirmed; and also the case of Plumley vs. Mass., 155, U. S., 461.

The general food act of Ohio (the one involved in this controversy) is copied verbatim from a New York Statute which, in turn, is copied from a Statute of Victoria. The law has stood the test of scores of courts in this country and in England. In Ohio this Act has been approved by the Supreme Court in the following cases:

State vs. Cap. City Dairy Co., 62 O. S., 350;
Palmer vs. State, 39 O. S., 236;
Meyer vs. State, 54 O. S., 242;
State vs. Kelley, 54 O. S., 166;
State vs. Dreber, 54 O. S., 115;
State vs. Ruedy, 57 O. S., 224;
Hutchison vs. State, 56 O. S., 82.

We call attention to a recent utterance of the Supreme Court of the United States, in Gundling vs. Chicago, which involved the right of the city to forbid the sale of cigarettes without a license, opinion by Mr. Justice Peckham:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation

they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for federal interference.

"It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. * * * So long as the State law authorizes both regulation and taxation it is enough, and the enforiement of the ordinance violates no provision of the Federal Constitution."

AS TO ARIOSA BEING A COMPOUND.

The Statute under consideration (Bates, 4200-6) excepts from its operation, mixtures and compounds where the package is labeled as a mixture and compound with the name and per cent. of each ingredient therein. The Court will readily perceive the object of this exception. If a person sell a mustard, it must be pure mustard and must comply with the Statute. If a person sell olive oil, it must be pure olive oil, and must conform to the Statute, and so with all the ordinary foods, because when a person asks for any of these well known foods, he must get a pure food, and have a right to demand without further words that they receive the pure article. But if a person invent a mixture there is no danger of anybody buying that for something else and believing it to be something else. For instance, no person would buy Peruna and expect it to be composed of pure olive oil. If a man invent a mixture which he calls "Swamp-Root Bitters," no person is going to be misled or deceived by supposing that it is something else, or that is a pure article, because there is no such article recognized and known to the general public, which could be confounded with that article. If a man invent a compound, which we will call "Mealine," that word does not suggest anything to the mind

or to the person except that it is a mixture of some kind and such a person has a right to sell "Mealine" and on the outside of the package label it as composed of a certain per cent. of meal, a certain per cent. of flour, and a certain per cent. of sugar, etc. The practice adopted by the complainants in calling their coffee Ariosa, labeling it a compound and pretending it is an article composed of and made up of three separate ingredients, is a trick and device so patent that its absurdity carries with it its own refutation. This substance is coffee, sold in a form that every berry is separate and distinct, and is merely coated and varnished. If complainants' product be a compound then every cheat and fraud need only to coat, color and varnish their various inferior grades of foods, and call it a compuond. This substitution of form for substance, may have pleased the appellants, but a little reflection ought to have convinced them that they could not in a court maintain such an evasion of the law. Of course, by this claim of being a compound they admit that the glazing is a violation of law and only seek to save themselves by coming within the exception.

STATUTES AFFECTING APPELLEE.

The following statutes define the appellees' duties:

Section 409-7: "(Ohio Dairy and Food Commissioner; Salary and Expenses.) That there is hereby created the office of dairy and food commissioner of the State of Ohio. Said commissioner shall be elected at the general election held on the first Tuesday after the first Monday in November, A. D. one thousand eight hundred and ninety-six. He shall take his office on the first Tuesday following the fifteenth day of February next after his election, and shall serve for two years, and until his successor is elected and qualified. He shall be charged with the enforcement of all laws against fraud and adulteration or impurities in foods, drinks or drugs, and unlawful labeling in the State of Ohio. His salary shall be two thousand dollars ($2,000) per year, and his necessary and reasonable expense incurred in the discharge of his official duties, to be paid in monthly installments at the end of each calendar month."

409-8. (General Duties of Himself and of His Assistants.) It shall be the duty of said commissioner or assistant commissioner, to inspect any articles of butter, cheese, lard, syrup or other article of food or drink and to prosecute or cause to be prosecuted any person or persons, firm or firms, corporation or corporations, engaged in the manufacture or sale of any adulterated article or articles of food or drink, or adulterated in violation of, or contrary to any laws of the State of Ohio."

409-9. (Powers; Prosecutions.) The said commissioner, or any assistant commissioner, shall have power in the performance of their duty, to enter into any creamery, factory, store, salesroom, drug store, or laboratory, or place where they have reason to believe food or drink are made, prepared, sold or offered for sale, and to examine their books, and to open any cask, tub, jar, bottle, or package, containing or supposed to contain any article of food or drink, and examine or cause to be examined and analyzed the contents thereof, and it shall be the duty of any prosecuting attorney in any county in the state, when called upon by said commissioner or assistant commissioner, to render him any legal assistance in his power, to execute the laws, and to assist in the prosecution of cases, arising under provision of this act."

409-10. (Assistant Commissioners, Experts, etc.; Expenses, Office, Report, etc.) Said commissioner may appoint not to exceed two assistant commissioners, whose salaries shall be one thousand dollars per year, and necessary traveling expenses incurred in the discharge of their official duties, to be paid in like manner with the commissioner's and on itemized vouchers approved by said commissioner; the said commissioner shall have power to employ such experts, chemists, agents, inspectors and counsel as may by him be deemed necessary for the proper enforcement of the laws, their compensation to be fixed by the commissioner." * * *

409-13. (Dairy and Food Commissioner to Give Bond.) The Ohio dairy and food commissioner, before entering upon the discharge of his official duties, shall give bond in the sum of five thousand dollars to the state, with two or more sureties to the acceptance of the governor, conditioned that he will truly account for and apply all

moneys or other property which may come into his hands in his official capacity, and for the faithful performance of the duties of his office as the same are prescribed by law; which bond with his oath of office indorsed thereon, shall be filed with the secretary of state.

SUGGESTIONS ON APPELLANTS' BRIEF.

It is conceded by complainants in their brief (page 2) in speaking of the coating and glazing of their product, that "its effect upon the appearance of the coffee is that of varnish. * * accentuating the color of each berry." It is this very act which is prohibited by the Statute. It forbids the sale in this state of any food "if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed or if by any means it is made to appear better or of greater value than it really is." It is not the province of this court to determine here whether or not complainants' act as stated by them is or is not a violation of the Statute. It is not the province of the respondent to show and prove the effect of this varnishing, coloring and coating, nor other improvements and adulterations of this product. The question to be decided by this Court in this hearing, must be those of law only and therefore we expressly disclaim any intention of entering upon the merits of the case in this discussion.

So far as this Court is concerned, the decision on this hearing must be the same, whether appellants' product consists of the vilest and most poisonous adulterations, or whether this treatment of its product is harmless. In either event that fact is immaterial and no prejudice should arise in favor of either party by any allegations in that behalf.

The further fact that appellants have been selling this product for thirty years, does not make their case any better than that of the man who has been selling for ten years or one year. The further allegation as to the labeling on the outside of each package, cannot affect the case. The further argument that the respondent, as dairy and food commissioner has notified complainants as to his views upon the product sold by them,

simply shows the fair and honorable manner in which he is attempting to conduct his office. Instead of arresting ten thousand dealers suddenly and without notice he gives appellants full time and notice as to their product in order that they may so amend their methods as to conform to the law. But it seems that having given them sufficient time and notice to thus conform to the law, this fact is made one of the reasons why he should be enjoined. Counsel mistake the meaning of the word "adulteration" as used by the Statute. In order that but one word may be used and that this word might have a particular meaning, the Statute describes what shall be deemed adulterated, so that the word must be used in its statutory significance and meaning there defined and not by the meaning which counsel attempt to give it. The further contention of counsel that this coffee is wrapped up and sealed up in a wrapper so the purchaser cannot see the coffee, can certainly have no bearing on the case.

INTERSTATE COMMERCE.

It is alleged in the complaint that this coffee is packed in packages and shipped to dealers in this State who then retail it. This is so manifestly the fact that no argument need be advanced or proof produced to establish it. The facts therefore and the manner of the sales by the grocers in Ohio are of such a character that they do not bring them within the protection claimed. If the Dairy and Food Commissioner had attempted or was about to attempt to prevent Arbuckle from selling a product to a grocer in Ohio, the question might be raised, but after the big sale between Arbuckle and his customer takes place and the wooden box with the contents has become the property and owned by a citizen of Ohio, and the citizen then begins to sell it as his own property, the protection of the Interstate Commerce feature is lost. This is too apparent to need further argument.

But further answer can readily be given to this contention of counsel. In the case of Commonwealth vs. Huntley, 156 Mass., 236, it is held as follows:

(4th syllabus.) "The enactment of a statute which forbids the manufacture and sale of oleomargarine which is made in imitation of yellow butter is a valid exercise of the police power which remains in the several States, though such oleomargarine has been imported from another State; and it is not in violation of the constitutional provision giving to Congress the power to regulate commerce among the several states."

The case of Plumbley vs. Mass., found in 155 U. S., 461, is certainly authority upon this point. In this case the Supreme Court of the United States holds that the State Legislature has power to enact a law *absolutely forbidding* the manufeature and sale of a certain food product, and further that a statute to prevent deception in the manufacture and sale of food products as to a food stuff brought into the State of Massachusetts, is not in conflict with the clause of the United States Constitution, investing Congress with power to regulate commerce among the several States. And that Court realizing that the case of Leisy vs. Hardin, 155 U. S., 100, had been decided without reference to the police power regulation of the several States, holds that the case of Leisy vs. Hardin "is restrained in its application to the case there actually presented for determination, and held not to justify the broard contention that a State is powerless to prevent the sale of articles of food manufactured in, *or brought from another State*, and subjects of traffic, or commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import."

Indeed the decisions have well established that while matters of Interstate Commerce are subject to the control of Congress yet the individual States are entitled likewise to some control which is so manifest in the exercise of its police power, especially as to matters which are local in their nature and operation.

"The line of distinction," says Judge Cooley, "between that which constitutes an interference with commerce, and that which is a mere police regulation is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases, which arise. It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish and to descend to the most minute directions if it shall be deemed advisable; and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations as well as the States, confining their operation to the subjects over which it is given control by the constitution. But as the general police power can better be exercised under the supervision of the local authority, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national courts, the regulations which are made by Congress do not often exclude the establishment of others by the State covering very many particulars."

Cooley's Const. Lim. (5th ed.), 724.

These doctrines are all exemplified and sustained in the following cases:

Ferry Company vs. Penn., 114 U. S., 196;
Kimmish vs. Ba., 129, U. S., 217;
Patterson vs. Kentucky, 7th Otto., 501;
Hinson vs. Lott, 8 Wall., 148;
Turner vs. Maryland, 107 U. S., 38.

AS TO ENJOINING EXECUTIVE DISCRETION.

It may be laid down as the correct rule of law that where the law imposes a definite and single line of action or duty upon a public official concerning which he must act and over which he has no discretion, and concerning which no issue of facts arises, an injunction may issue to prevent such action on his part, if the law be void, or on the other hand mandamus may issue to compel him to perform that duty. *But counsel may search in vain for either a precedent or a good reason for*

a court interfering in cases where the executive is merely exercising his judgment as to the guilt or innocence of a citizen by causing the arrest or refusing to cause the arrest of any citizen for alleged violation of a valid criminal statute.

In brief the Court will never substitute its judicial control for mere executive discretion.

It is right at this point and on this subject that counsel for appellants, have, in our opinion, erred. And we respectfully submit without controverting any of the cases cited by them, that all such cases so cited, fall within the first proposition above named. With this distinction this cause becomes clear and the cases are all harmonious.

The reason is apparent. A discretion subject to judicial control is one to be exercised, not according to the judgment and conscience of the one in whom the law confides it, but according to the judgment and conscience of another in whom the law does not confide it. The Court will therefore observe that in all the cases cited, those which hold in favor of judicial control by mandamus or injunction of an executive officer, relate to matters in which the law has imposed or attempted to impose a definite and single line of action or duty upon such public official, concerning which he has no discretion; and that the cases refusing it, fall within those incidents where the law itself is not questioned but issue is taken with the opinion or executive discretion of the officer himself.

As facetiously stated in the case of Judges vs. The People, 18 Wend., 79-99,

> "We have a power in ourselves to do it, but it is a power which we have no power to do."

And further,

> "As a matter of faith, we can assent to the theological dogma of 'an overruled free agency,' but in a matter of legal reasoning we are justified in asking for pretty strong evidence to convince us that a judicial discretion can exist independently of the right or power of exercising it."

Perault vs. Rand, 10 Hun., 222, holds that

> **"A court of equity will not restrain by injunction a court martial from trying one, subject to its jurisdiction where he alleges as the only ground of injunction, that he has already been tried on the same charge and that he apprehends that the second trial will be unfairly conducted."**
>
> **See High, Section 46.**

There are well reasoned cases which even go so far as to hold that the legislature itself can not invest the judicial department of the government with authority to assume jurisdiction over legislative or executive departments.

Sterling vs. Doake, 29 O. S., 457;
State vs. Nichols, 26 Ark., 74;
State vs. Sloss, 25 Mo., 291;
Atty. General vs. Brown, 1 Wis., 513;
Haley vs. Clark, 26 Ala., 439;
Smith vs. Myers, 109 Ind., 1.

In the case of Cunningham vs. R. R. Co., 109 U. S., 446, the court holds (page 452 et seq.) that a class of cases has arisen which gives rise to some controversy, and that is where the law has imposed upon an officer a well defined duty in regard to a specific matter in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process. But the court holds (page 453):

> "But in all such cases from the nature of the remedy by mandamus, the duty to be performed must be merely ministerial and must involve no element of discretion to be exercised by the officer."

And the Court there cites the authorities for this doctrine.

And the Court commenting upon the bold stand taken in the case of Davis vs. Gray, 16 Wall., 103, says: (P. 453):

> "But it is clear that in enjoining the governor of the State in the performance of one of his executive functions the case goes to the verge of sound doctrine, even beyond it, and that the principle should be extended no farther."

Further in the same case the court (page 454) quotes the language of Mr. Justice Bradley, and commenting upon it says it is well and tersely expressed as follows:

> "The objection to proceedings against State officers by mandamus or injunction are, first, that it is in effect proceeding against the State itself; second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these can be done. A State without its consent cannot be sued as an individual; and the court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter. But it has been settled that where the plain official duty requiring no exercise of discretion is to be performed, a performance is refused, any person who will sustain a personal injury by such refusal may have a mandamus and compel performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain a personal injury thereby for which adequate compensation cannot be had at law, may have an injunction to prevent it."

In the case of Gaines vs. Thompson, 7 Wall., 347, the Supreme Court of the United States holds in the syllabus as follows:

> "The act of the Secretary of the Interior and the Commission of the Land Office in cancelling an entry for land, is not a ministerial duty, but is a matter resting in the judgment and discretion of these officers as representing the executive department. Accordingly this court will not interfere by injunction more than by mandamus to control it."

And the court here quotes (page 351) the language used by Chief Justice Taney in the case of Commissioner of Patents vs. Whiteley (4th Wall., 522):

> "In general such duties whether imposed by Act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in ex-

pounding the laws and resolutions of Congress under which he is required to act."

And continuing, the court says, that if a suit should come before a Court involving the construction of any of these laws, the court would not be bound to adopt the construction given by the head of the department and if they thought his decision wrong, they would of course so pronounce their judgment. But that this judgment upon the construction of the law must be pronounced in a different manner than that contended for, and that the court would not by mandamus "act directly upon the officers and guide and control his judgment or discretion in the matters committed to his care in the ordinary exercise of his official duties. The interference of the Courts with the performance of the ordinary duties of the executive department would be productive of nothing but mischief."

U. S. vs. Seaman, 17 Howard, 225;
U. S. vs. Guthry, 17 Howard, 284;
U. S. vs. Commissioner, 5th Wall., 563.

We call especial attention of the Court to this case of Gaines vs. Thompson, 7 Wall., 347, for the reason that the discussion of the principals is so thorough and the cases reviewed commencing with the famous decision of Chief Justice Marshall, in the case of Marberry vs. Madison (1st Cranch, 137).

The foregoing case of Gaines vs. Thompson is again reaffirmed in the case of Litchfield vs. Register, 9 Wall., 576, where the doctrine contended for by the respondents in this case again is sustained.

To the same effect is the case of State of Georgia vs. Stanton, 6 Wall., 50, very ably argued. And the court holds that such a decision would call for a judgment upon the political question and will therefore not be entertained by the court.

In the case of the State of Mississippi vs. Andrew Johnson, President, 4th Wall., 475, the court holds that the President of the United States cannot be restrained by injunction from carrying into effect an act of Congress alleged to be uncon-

stitutional. In that case the court very clearly distinguishes between discretion and a positive line of action, and holds (page 498) that

> "A ministerial duty, the performance of which may in proper cases be required of a head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist and imposed by law." The Court further holds in the case of Marbery vs. Madison, and likewise in the case of Kendall vs. Stockton that "nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance it was held, might be required by mandamus."

The court then very clearly shows the absurdity and injustice of attempting to direct or control an officer in the exercise of mere discretion in the enforcement of law.

And upon the contention strongly urged that an injunction should issue to restrain such action under the Legislature, which is alleged to be unconstitutional, the Court holds that that circumstance would not take the case out of the general principles which forbid judicial interference with the exercise of executice discretion.

In Cohen vs. Commissioners, 77 N. C., 2, plaintiff complains of illegal town ordinance under which he was constantly being arrested. Injunction refused.

In Fickle vs. Commissioners, 66 How. Pr., 318, court holds against injunction for illegal arrest on ground plaintiff has prompt relief by habeas corpus and injunction refused to prevent defendant commissioners from closing up plaintiff's business.

In Hinton vs. Sheriff, 46 Ga., 350, it is held in the syllabus, that:

> "The issuing of executions by the Comptroller General to collect the public revenue due to the State is the act of the Executive department of the Government and the Courts have no power to prescribe the kind or sufficiency of the evidence which shall be necessary to authorize the

process of execution to issue against defaulting officers or agents or to restrain that department in pursuing this cause."

In the case of Chicago vs. Wright, 69 Ill., 318 it is held that

"A Court of equity has no power to enjoin the exercise of the police powers given by law to the officers of a municipal corporation."

And further that,

"The Court has no jurisdiction to interfere with the public duties of any of the departments of the government or override the policy of the State."

In the case of R. R. Co. vs. DeGraaf, 27 Minn., it is held that,

"No act done or threatened to be done by any member of the executive department of the State government in his official capacity can be brought under judicial control or interference by mandamus or injunction whether such act proceeds from an error of judgment or misapprehension of official duty under the law."

"This rule applies both to ministerial acts and those which involve the exercise of judgment and discretion, and also to acts done in the performance of every official duty, whether it arises out of the Constitution or a legislative enactment."

The case of Osborne vs. Bank, 9 Wheaton, 738, cited by complainants involved the sole question as to whether or not the Legislature of the State of Ohio could legally tax the United States Bank. There was no discretion of any kind involved in the duty of the state officer enjoined.

"Injunction will not be granted in any case to restrain an act which is being or about to be done in the legitimate exercise of judicial of official discretion. And a board of county commissioners is a court of inferior and limited jurisdiction, and though statutory powers conferred on such tribunal must be strictly pursued, in accordance with the course pointed out, yet when such a court has been entrusted with the exercise of discretionary powers and the acts done are within the power

conferred, and have been performed in good faith, then no court possesses the power to interfere or control such discretion. Accordingly where supervisors have jurisdiction to review the orders of commissioners of highways on appeal, equity will not interfere with their action when they proceed regularly in the exercise of such jurisdiction. Nor will a board of county commissioners be prevented by an injunction from changing the depository of the public moneys of a county, when in the discretion of the board it is deemed best that a change should be made, nor will they be restrained in anticipation of their paying alleged illegal claims, it not being alleged that there is an excess of jurisdiction on the part of the board. So an order of county court establishing a ferry is a judicial act, which cannot be set aside except on appeal, and the exercise of the privilege conferred thereby cannot be prevented or restrained by an order of injunction issued by another court in an independent or distinct action or proceeding."

Spelling on Extraordinary Relief, Section 617.

"Executive State Officers. — It would be difficult to lay down an unqualified rule defining the powers of courts of equity to restrain by injunction the acts and conduct of executive officers of the State and the heads of departments in the national government. The partition of government into legislative, judicial, and executive branches implies, and constitutions usually expressly provide for, the independence of each and prohibit encroachments upon the proper province of each by either of the others; and yet an examination of the decisions discloses that State officers, even governors, have been virtually subjected to the rule which applies in the case of county and town officers, that is, they will not be interfered with in the exercise of duties which require the exercise of discretion, but will be enjoined from the doing of acts which are purely ministerial in character when not authorized by law." Idem, 623.

"The delivery of a certificate of election to one claiming to have been elected a member of Congress is an act calling for the exercise of judicial discretion on the part of the governor of a State and cannot be controlled by injunction. And if the President of the United States

is in any case subject to the civil jurisdiction of the courts in matters pertaining to his official duties, it is plain that he cannot be enjoined from executing an act of Congress claimed to be unconstitutional until such act has been passed upon by the courts since the duty of judging of the validity of laws with reference to their constitutionality is imposed upon him by the constitution, and necessarily calls for the exercise of judicial discretion in its performance; and it is immaterial in such case whether the President be described by his official title or be proceeded against as a citizen of a State. So a cancellation of a land entry in the land office cannot be enjoined, it being considered the exercise of a discretionary rather than a ministerial duty. But there are several cases in which the power of interference by the courts with acts by executice officers was denied irrespective of the character of such act whether ministerial or discretionary, legal or illegal, there being considered to be a lack of jurisdiction over the subject matter."

Spelliing on Extraordinary Relief, Section 625.

"No court has jurisdiction to interfere with the public duties of any of the departments of the government, or to override the policy of the State; and a court of equity is without power to enjoin the exercise of the police powers given by law to the officers of a municipal coropration, so as to prevent such officers from preserving the public peace, such for instance as keeping a public street open to public use. Nor will an injunction issue to restrain an interference by the police authorities with the business of a liquor dealer by arresting him and his employes. If the arrests are illegal, habeas corpus and suit for damages afford him ample remedy. And an injunction was refused where sought to restrain the police authorities within a metropolitan police district from placing policemen in front of a public house in which guests had been repeatedly subjected to unjust, exorbitant and illegal charges and from giving warning to strangers about to enter to be careful. Nor does it alter the case that police supervision is exercised in an arbitrary and unlawful manner."

Spelling on Extraordinary Relief, Section 628.

ACTION FORBIDDEN BY STATUTE.

It is provided by Section 720, Revised Statutes of the United States as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

And it is held in the case of In re Long Island Trans. Co., 5th Federal Reporter, 628, that this action applies to the restraint of suits which, but for the injunction, the State Court would have the jurisdiction over.

The object of complainants' action here is manifestly to prevent any action being taken against third persons, to wit, about ten thousand grocers or any one of them in the State Court and whatever may be the form of this action, its result is clearly in violation of Section 720 above quoted. An exception to this rule can only occur where the injunction is to restrain the prosecution in a State Court and multiplicity of suits after there had been a sufficient number of trials and cases had to justify the assumption that further prosecutions would be in violation of law. If, for instance, a few grocers should be arrested in Ohio and the result of the proceedings either on the part of one or the other would be to establish the complainants' claim here, to wit, that their product did not violate the law we might take up that question and discuss it, but no such case exists here.

NO ADEQUATE REMEDY.

Appellants have laid much stress upon the fact that they have no other adequate remedy and that they will suffer a great deal if they are permitted to have any of their customers arrested under the Statute. Of course it is apparent to the court that in order to have any action taken by any court, such as will accomplish their object, they must substitute for the original complainants in this case, the names of the ten

thousand grocers who are to be affected; and they must then substitute for the respondent below, the names of all the prosecuting attorneys of Ohio, the names of all the attorneys for the Dairy and Food Department, the names of all private citizens who might swear out warrants, the names of all the chemists and other scientific men who might render reports after examination, the names of all the inspectors of the Dairy and Food Department who are no wacting and who may hereafter be appointed, and others. It might also be well for the complainants below, after modifying their suit in this manner, to give a bond unto the State of Ohio in a large sum to the effect that they will not violate the law in the future, because it is asking the Court to go a great way it seems to us, to assume that even if they have not violated the law in the past, that they will not or might not do so in the future.

The above suggestions, although ridiculous illustrate in a simple manner what Chief Justice Marshall, (quoted in the case of State of Mississippi vs. Andrew Johnson, President 4th Wall., 475,) characterizes as an "absurd and excessive extravagance."

All the argument which counsel urge, showing their helplessness before the law by reason of their innocence of any crime and their liability to prosecution, is a burden we admit, but it is a burden which must be borne by every citizen of this Republic. It matters not how innocent a man may be of any charge. It matters not how unreasonable a public officer may be in his beliefs or opinions in regard to the guilt of such citizen. Nevertheless the innocence of that citizen must be proved in a tribunal for that purpose, *after he has been charged with the crime*, and cannot be forestalled by an injunction.

Therefore the dealer in Ariosa coffee must like every other citizen, with respect to any other crime, run the risk and assume his burden of being called upon rightly or wrongly, to answer unto the charge of a misdemeanor.

Let us suppose a stronger case: Let us suppose that an

officer charged with the administration of the criminal laws, should publicly declare that he intended to arrest every citizen who sold any kind of coffee, under a mistaken idea on his part that it was an offense under the laws of this State to sell coffee at all; or suppose that he should further announce that he intended to arrest one John Brown, for a theft of a bicycle, although John Brown could prove conclusively his innocence; would either be permitted to come into a court of equity in advance and prove his innocence and enjoin the official?

The Court below therefore was right in refusing to entertain jurisdiction; and as to its action in dismissing the bill, it followed the precedent established in State vs. Johnson, 4 Wall., 475, quoted above.

CASES CITED BY APPELLANTS.

To avoid the effect of the Eleventh Amendment to the Constitution of the United States, the appellants cite numerous cases, all of which seem to be clearly distinguishable from the case at bar. In Pennoyer vs. McConnaughy, 140 U. S. 1, an injunction was allowed against land commissioners of the State of Oregon working irreparable damages under an unconstitutional statute to one having a contract with the State for the purchase of land. In this case the plain ministerial duty of the land commissioners was to execute the contract between themselves and the complainant. In that case Mr. Justice Lamar divides the classes of cases heretofore considered by this Court under the Eleventh Amendment into two classes:

> "The first class is where the suit is brought against the affairs of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. In re Ayers, 123 U. S., 443; Louisianna vs. Jumel, 107, U. S., 711; Antoni vs. Greenhow, 107 U. S., 769; Cunningham vs. Mason and Brunswick Railroad, 109 U. S., 446; Hogood vs. Southern, 117 U. S., 52.

> "The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, in a like case, to enforce upon the defendant *the performance of a plain, legal duty, purely ministerial*, is not within the meaning of the Eleventh Amendment an action against the State."

In Pennoyer vs. McConnaughy the Court went no farther than to hold that that case fell within the second class as given above and granted the relief sought on the ground that the threatened acts were against the complainants' property rights; that the statute under which such proceedings were being had was unconstitutional and that the duty of the respondent was a plain, legal duty and purely ministerial. All these three essentials are lacking in the case at bar. While, on the contrary, this action can be readily placed in the first class described by the learned Justice, because it is brought against an officer of the State "representing the state's action" for the institution of a criminal proceeding such as is sought to be enjoined here is particularly the action of the State and its exclusive action.

So in Scott vs. Donald, 165 U. S., 58, the court said only that that action was not forbidden by the Eleventh Amendment because, following the principle laid down in In re Tyler, 149 U. S., 164 the rule was

> "That where a suit is brought against defendants who claim to act as officers of a State, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State, for compensation for damages, such suit is not, within the meaning of the amendment, an action against the State."

Similarly in Tindal vs. Wesley, 167 U. S., 204, where the State had authorized the conveyance of certain lands and such lands had been conveyed pursuant to the enabling act, it was held that officers of the State could not after such enabling act had been repealed subsequent to the execution of deeds for the lands take possession of them and avoid the consequences thereof by interposing the Eleventh amendment. It was the trespass of the individuals which the Court forbade.

In Western Union Telegraph Company vs. Myat, 98 Fed. Rep., 335, an injunction was granted by the Circuit Court against members of the Court of Visitation of the State of Kansas and the State Solicitor from enforcing an invalid limitation on telegraph rates, but only after it has been determined that the act creating the Court had attempted to confer upon that tribunal legislative, administrative and judicial functions and that the act was therefore unconstitutional and void.

In this case, it must be observed, there exists the very important distinction noted by Mr. Justice Brewer, then a Circuit Judge in Railway Co. vs. Dey, 35 Fed. Rep., 866. In the latter case the Circuit Court enjoined Commissioners from enforcing certain illegal rates for railroad charges. The distinction then drawn and it applies equally to Telegraph Company vs. Myat, supra, is that in the outcome of the action, the State had no possible concern; that the action was one concerning only the shipper and carrier, and that it involved the interests, rights or dignity of the State in no way. And this same distinction is to be drawn between the case at bar and Smyth vs. Ames, 166 U. S., 466; Prout vs. Starr, 188 U. S., 537; Central Trust Co. vs. Citizens' St. Ry. Co., 80 Fed. Rep., 218; Union Pacific R. R. Co. vs. Alexander, 113 Fed. Rep., 347 and L. & N. R. R. Co. vs. Brown, 123 Fed. Rep., 946. In the case at bar, the State is not only a party in interest, but it is the only party in interest. All criminal proceedings are the proceedings of the State. The sovereign always reserves the right in name and in fact to set in motion the wheels of

criminal procedure. The injunction of a criminal prosecution is, therefore a complete example of a successful challenge of the sovereignty of the State.

So in Jew Ho vs. Williamson, 103 Fed. Rep., 10, the Court did not grant relief from a constitutional but from what it expressly declared to be an unconstitutional statute.

AS TO ENJOINING CRIMINAL PROSECUTIONS.

Counsel for appellants have cited a number of decisions of inferior tribunals, which have departed from the rule and boldly enjoined criminal prosecutions. In each of these cases however, we note that there was involved an unconstitutional statute. In all but one or two the injunction prevented a seizure of property, or tearing down property or civil actions for recovery of a penalty for failure to take out license, etc.

Whether it will ever be seriously urged again in the Supreme Tribunal of the nation that a Court of Equity may stay by injunction a threatened criminal prosecution, if that prosecution might injure sales of property, the question can easily be settled so far as this case is concerned. Because, granting the law to be as laid down in the isolated cases cited by appellants, they do not apply here.

One distinguishing feature is that they involve merely and solely the unconstitutionality of a statute.

The court had nothing further to consider.

But in the case at bar, the Court of equity must sit first as a tryer of fact as to whether or not appellants' food stuffs were adulterated, and after hearing the evidence pro and contra, decide the preliminary question of guilt before issuing the injunction.

ABSURDITY ILLUSTRATED BY PRACTICAL CASE.

Let us give appellants the victory here and return to the Circuit Court for trial. Respondent answers, saying complainants' food stuff was adulterated. The Court proceeds with the evidence. Witnesses are called to prove and disprove the following points:

(1) That rotten eggs were used in coating.

(2) That the egg coating rotted after application.

(3) That unhealthful sugar was used.

(4) That the coating mixture or varnish made of sugar and eggs was a breeder of bacteria and disease.

(5) That coffee berries were not used altogether but artificial paste berries mixed in.

(6) That sticks and stones were mixed in for weight.

(7) That the holes of worm-eaten berries were filled up and concealed.

(8) That the color of the berry was heightened.

(9) That the glazing made No. 8 coffee look like a No. 7 and No. 6, which are higher grades.

(10) That 3-cent sugar placed on the coffee berry was being sold for 14 cents.

(11) That an injurious preservative, salicylic acid, was added to the glazing mixture.

(12) That increased weight was added by the cheap coating and moisture of bean greatly increased.

(13) That the coffee was not Ariosa, but a cheaper grade sought to be sold under that name.

The issues could be multiplied, of course, very much more. After the Chancellor had heard the chemists, experts, and other witnesses, he will be ready (we shall assume) to find the submitted samples pure and unadulterated. But just as he is about to grant the injunction, the respondents suggests that while that may be true as to the samples submitted, how can he know what will be the fact as to purity next month and the years to come. A bond could be ordered to be given by complainants that they will always keep from violating the

food laws in the future, and an inspector appointed by the Court to watch the factory. But here again the respondent suggests that complainants are not retailing in Ohio, but that some "ten thousand grocers" unpack the goods and sell it to the people, and it is well known that much of the adulteration of foods, liquors, oils, syrups, drugs, etc., is done by the retailer, although the manufacturer had sold the pure article.

However, the strong arm of equity could reach these ten thousand grocers who could be made parties and made to give a bond.

But just as the Chanellor, almost in despair, would finally be ready to issue the longed for injunction, the respondent would again humbly suggest that he himself never swore out a warrant in his life; that most of the arrests were caused by citizens who purchased foods for their own use, and respondent could not tell who these persons would be in the coming years.

It must be apparent, therefore, that, conceding the general doctrine of injunction against criminal prosecution most liberally, and that a suit such as this would lie against the state, the Court would not do a vain thing, and from its very nature the writ would have to be refused.

Respectfully submitted,

ROSCOE J. MAUCK,
EDMOND B. DILLON,
Solicitors for Respondent.

Supreme Court of the United States.

No. 66.—October Term, 1903.

John Arbuckle, William V. R. Smith, James N. Jarvie and William A. Jamison, Appellants, *vs.* Joseph E. Blackburn, Dairy and Food Commissioner of the State of Ohio. } Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

[December 7, 1903.]

This was a bill filed by Arbuckle Brothers against Joseph E. Blackburn, as Dairy and Food Commissioner of the State of Ohio, to restrain him from certain action on his part as such officer, including prosecutions for violation of pure food laws of the State.

After a jurisdictional clause setting forth diversity of citizenship, the bill averred that by an act of the general assembly of the State of Ohio, passed in the year 1884, entitled "An act to provide against the adulteration of food and drugs," as amended by an act passed in the year 1890, entitled "An act to amend section 3 of an act entitled 'An act to provide against the adulteration of food and drugs,' passed March 20, 1884," which act was still in full force and virtue, it was provided that no person should, within the State of Ohio, manufacture for sale, offer for sale, or sell any article of food which was adulterated within the meaning of said act, and that the term "food" used therein should include all articles used for food or drink by man, whether simple, mixed or compound. That it was further provided that food should be deemed adulterated "(1) If any substance or substances had been mixed with it, so as to lower or depreciate, or injuriously affect its quality, strength or purity; (2) If any inferior or cheaper substance or substances have been substituted wholly or in part for it; (3) If any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it; (4) If it is an imitation of, or is sold under the name of, another article; (5) If it consists wholly, or in part, of a diseased, decomposed, putrid, infected, tainted or rotten animal or vegetable substance or article, whether manufactured or not—or, in the case of milk, if it is the product of a diseased animal; (6) If it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is; (7) If it contains any added substance or ingredient which is poisonous or injurious to health; provided, that the provisions of this act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, if each and every package sold or offered

for sale be distinctly labeled as mixtures or compounds, with the name and per cent of each ingredient therein, and are not injurious to health."

The bill alleged that for more than thirty years complainants and their predecessors had been engaged, and still were, in the manufacture and sale throughout the United States, including the State of Ohio, a certain compound or mixture known as Ariosa, composed of roasted coffee compounded and mixed with eggs and sugar, whereby the separate beans were coated, and to a large extent hermetically sealed after roasting with a compound of sugar and eggs, the original strength and aroma of the coffee being thus preserved and deterioration prevented; that the coffee, eggs and sugar were each "a common, healthy and unobjectionable article of food;" that Ariosa had acquired great reputation, and the good will of the business of its manufacture and sale had become very valuable; that it was sold in Ohio in packages, each of which, in compliance with the laws of Ohio in respect to the adulteration of food, was distinctly labeled with a printed statement of the precise composition and the proportion of each of the ingredients of the article.

And it was charged that, notwithstanding these facts, defendant as dairy and food commissioner of Ohio had notified complainants that he considered Ariosa, as put up by them, an adulteration; that he had issued a circular letter to dealers and vendors wrongfully asserting that complainants in the manufacture and sale thereof refused to abide by the laws of Ohio in that behalf; and that he proposed to institute prosecutions to prevent and punish its sale or offer for sale in Ohio.

By the sixteenth paragraph of the bill it was averred that "said statute, construed as respondent claims it should be, is in conflict with the Fourteenth Amendment to the Constitution of the United States, and void, in that it would deprive complainants of their aforesaid property," and would deny them "equal protection of the law."

And by the seventeenth paragraph it was averred that Ariosa was shipped to and sold in Ohio in original packages, "and said statute, if construed as the respondent herein claims it should be, is a regulation by the said State of Ohio of interstate commerce, and is repugnant to, and in violation of, the third clause of section eight of article one of the Constitution of the United States, and void."

That if "respondent be permitted to commit the threatened wrongs, the same will, as complainants are informed and believe, damage complainants to the extent of more than $100,000, an amount largely in excess of respondent's ability to respond in judgment."

The prayer was that the commissioner be restrained from charging that Ariosa was an article of food adulterated within the meaning of the statute, and that the use of the process of coating and glazing the coffee with the preparation of sugar and eggs and the importation and sale

constituted violations of the statute; from threatening dealers with prosecution; and from instituting or commencing prosecutions.

The case came on to be heard on complainants' application for a preliminary injunction and was submitted on pleadings and evidence, whereupon the Circuit Court entered a decree denying the injunction and dismissing the bill, which decree was affirmed by the Circuit Court of Appeals, 113 Fed. Rep. 616, and the case then brought here by appeal.

Mr. Chief Justice FULLER delivered the opinion of the Court:

We are of opinion that this appeal must be dismissed, because the jurisdiction of the Circuit Court was "dependent entirely upon the opposite parties to the suit or controversy being citizens of different States," and the decree of the Circuit Court of Appeals was final. Act of March 3, 1891, 26 Stat. 816, c. 517, § 6.

The Circuit Courts have "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, . . . or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, . . ." Act of March 3, 1887, 24 Stat. 552, c. 373; Act of August 13, 1888, 25 Stat. 433, c. 866.

In the present case the Circuit Court had jurisdiction on the ground of diverse citizenship, but it is now contended that jurisdiction also rested on the ground that the suit was one arising under the Constitution of the United States.

The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form such as is required in good pleading. *Defiance Water Company* v. *City of Defiance*, *ante*, p. —, and cases cited.

The averments of this bill did not bring the case within that rule for they put forward no existing controversy as to the effect or construction of the Constitution, on which the relief depended, and set up no right which might be defeated or sustained according to such construction.

By the laws of Ohio the office of Dairy and Food Commissioner was created, and it was made the duty of that officer to attend to the enforcement of all the laws against fraud and adulteration or impurities in food, drink, or drugs; to appoint assistant commissioners; and to employ such experts,

chemists, agents, inspectors and counsel as he might deem necessary for the proper enforcement of the laws; and it was also made his duty to inspect any articles made or offered for sale as articles of food or drink, and to prosecute, or cause to be prosecuted, any person or persons, firm or firms, corporation or corporations engaged in the manufacture or sale of any article of food or drink adulterated in violation of any laws of the State. 1 Bates' Ohio Statutes (1897,) p. 262, Tit. III, c. 18.

By the act of 1884, as amended in 1890, and set out in the bill, it was provided, among other things, that food should be deemed adulterated "if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is." 2 Bates' Ohio Statutes (1897,) p. 2229, Tit. V. ch. A. The proviso excepted mixtures and compounds, recognized as ordinary articles of food, not injurious to health, and labeled as required.

It is not asserted that this police regulation is in contravention of the Constitution of the United States, but it is said that when the commissioner, in the discharge of his duty under the law, reached the conclusion that the coating of Ariosa with a glaze of sugar and eggs was calculated to conceal damage or inferiority, and to make the article appear better or of greater value than it really was, and that the article was not a compound or mixture, and proposed to prosecute, he thereby construed the act in a way, which, if his construction were correct, would render it unconstitutional.

But these were findings of fact which resulted in bringing the article within the prohibition and excluded it from the proviso, and neither findings nor prosecutions would in themselves constitute a deprivation of property, or a denial of the equal protection of the law, by the State, or any direct interference with interstate commerce, and the constitutionality of the statute was conceded.

The suggested controversy was purely hypothetical and based the supposed constitutional objections on the contingency that, on issues of fact, it might be judicially determined that Ariosa came within the statute, which complainants denied.

If the commissioner's conclusions were erroneous, the courts were open for the correction of the error, and the possibility that they might agree with the commissioner could not be laid hold of as tantamount to an actual controversy as to the effect of the Constitution, on the determination of which the result of the present suit depended. Indeed, in the only case called to our attention by counsel involving the status of Ariosa, the Court of Common Pleas of Lucas County, Ohio, held that it was not within the prohibition of the statute. *White* v. *Ohio*, 12 Ohio Nisi Prius Decisions, 659.

Reference to the Constitution to strengthen objections to a particular construction, or the pursuit of a certain course of conduct, is not sufficient

to invoke jurisdiction. Whatever grounds of equity interposition may have existed here, and we express no opinion on that subject, the jurisdiction of the Circuit Court as a court of the United States depended alone on diverse citizenship. If the allegation of that fact had been omitted from the bill, the jurisdiction could not have been maintained.

Appeal dismissed.

Mr. Justice DAY took no part in the disposition of the case.

True copy.

Test:

Clerk Supreme Court, U. S.